United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH V. MANNING, AS PRESIDENT OF THE AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASS'N, *et al.*, *Plaintiffs-Appellees*,

v.

AMERICAN AIRLINES, INC., *Defendant-Appellant.*

S. D. N. Y. 63 Civ. 1187

Docket No. 28461

CHARLES H. RUBY, AS PRESIDENT, etc., *Plaintiffs*,

v.

AMERICAN AIRLINES, INC., *Defendant-Appellant*,

and

NICHOLAS J. O'CONNELL, *et al.*, *Additional Defendants-Appellants*,

and

JOSEPH V. MANNING, AS PRESIDENT, etc., *Intervenors-Appellees.*

S. D. N. Y. 63 Civ. 585

Docket No. 28473

APPENDIX TO BRIEF FOR AMERICAN AIRLINES, INC., DEFENDANT-APPELLANT.

PART TWO.

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INDEX TO THE APPENDIX.

PART ONE:

	PAGE
Explanation of the Arrangement of the Appendix	1a
Statements under Rule 15(b)	1a
Docket No. 28473 (Bargaining Appeal)	1a
Docket No. 28461 (Dues Check-Off Appeal)	2a
Order of the District Court in Docket No. 28473 (Bargaining Appeal)	3a
Order of the District Court in Docket No. 28461 (Dues Check-Off Appeal)	5a
[Opinion of the District Court in Docket No. 28473 (Bargaining Appeal) Part Two,	1b]
Opinion of the District Court in Docket No. 28461 (Dues Check-Off Appeal)	7a
Excerpts from Transcript in Docket No. 28461 (Dues Check-Off Appeal)	19a
(1) Admission of appellees' counsel on lack of jurisdiction to determine craft or class	19a
(2) Stipulation that March 15 agreement covers flight engineers	19a
(3) Stipulation that FEIA did not seek remedies before the NMB or the Adjustment Board	20a
(4) Admissions that dues check-off agreement terminated on April 30	20a
(5) Testimony of FEIA President Joseph Manning:	
failure to confer	21a
failure to make alternate arrangements to collect dues	22a

PAGE

Excerpts from Transcript in Docket No. 28473 (Bargaining Appeal) 23a

(1) Testimony of Allied President, Nicholas J. O'Connell:

"redding out" process 23a

FEIA did not insist on ALPA participation 24a

(2) Testimony of FEIA President Joseph Manning:

FEIA suggested independent union 25a

FEIA will join new organization 25a

(3) Testimony of American Vice President James Lamond:

agreements reached with Joint Committee during January-February 26a

negotiation of flight engineer provisions by O'Connell 26a

statement of NMB Chairman at close of negotiations 29a

statement to NMB Chairman with respect to negotiating retroactive pay for flight engineers 29a

Letter of FEIA President Joseph Manning, March 7, 1963, to W. B. Whitacre (Plaintiffs' Exhibit 1 in Dues Check Off Case) 30a

Letter of W. B. Whitacre, February 28, 1963, to FEIA with American's Proposed Changes to Basic Agreement Attached (annexed to Plaintiffs' Complaint as Exhibit A) 32a

Letter of FEIA President Joseph Manning, February 28, 1963, to W. B. Whitacre Containing Proposed Changes to Basic Agreement (annexed to Plaintiffs' Complaint as Exhibit B) 34a

PAGE

Letter of Counsel for Appellees to NMB, May 8, 1963 (annexed to Defendant's Exhibit K in Docket No. 28461) 35a

Letter of FEIA President Joseph Manning, March 8, 1963, to W. B. Whitacre Containing Proposed Change to Dues Check Off Agreement (Annexed to Plaintiffs' Complaint as Exhibit D) 39a

Affidavit of James J. Lamond, April 30, 1963, and Exhibit E thereof 40a, 48a

Affidavit of E. G. Hamilton, May 17, 1963 ..... 52a

Portion of Affidavit of Nicholas J. O'Connell, April 8, 1963 (from Docket No. 28473) 53a

Affidavit of W. B. Whitacre, with Exhibits D and E, July 11, 1963, Submitted in Connection with Suggestion of Mootness in Docket No. 28473 ..... 58a, 59a-61a

Letter from Counsel for Appellees to James J. Lamond, July 19, 1963 ..... 62a

Portion of Negotiating Notes (Plaintiffs' Exhibit 99 in Bargaining Case), January 31, 1963 ..... 63a

Portion of Negotiating Notes (Plaintiffs' Exhibit 100 in Bargaining Case), February 1, 1963 ..... 65a

Flight Engineer Wage Proposal Made To American, February 2, by the FEIA in the Name of the "Joint Committee Representing the Cockpit Crew Members" 67a

Portion of Negotiating Notes (Plaintiffs' Exhibit 107 in Bargaining Case), February 12, 1963 ..... 68a

Portion of Negotiating Notes (Plaintiffs' Exhibit 108 in Bargaining Case), February 13, 1963 ..... 69a

Collective Bargaining Agreement of July 9, 1963 between American Airlines, Inc. and Allied Pilots Association (submitted at request of District Court in Docket No. 28473) 71a

PART TWO (Separately bound):

	PAGE
Opinions of the District Court (Bargaining Appeal)	
Motions for Preliminary Injunction	1b
Summary Judgment	56b
Certain Documents Attached to or Referred to in Affidavit of Thomas A. Tracy, Assistant Executive Secretary, National Mediation Board, filed in *ALPA* v. *NMB* in the District Court for the District of Columbia (Civil No. 1544-63) and in this Court in the separate appeal by the Air Line Pilots Association (Docket No. 28417)	
Exhibit (1). NMB letter of April 24, 1963	58b
Exhibit (2). NMB telegram of May 8, 1963	59b
Exhibit (4). Statement of May 16, 1963 on behalf of American Airlines, Inc.	60b
Exhibit (5). American Airlines Telegram	71b
Exhibit (I). NMB letter of May 24, 1963	72b
Exhibit (9). Della Corte telegram of June 13, 1963	73b
Exhibit (L). NMB letter of June 5, 1963	74b
Crew Complement Document, December 1, 1962	75b
Portion of Affidavit of Counsel, March 13, 1963, Submitted in Connection with Motion for Reference to a Master	86b
Decision of the Civil Aeronautics Board in *FEIA, EAL* v. *Eastern Air Lines, Inc.*, C. A. B. , E-19923, August 19, 1963	87b

INDEX TO THE APPENDIX.

	PAGE
Opinions of the District Court:	
Motions for Preliminary Injunction	1b
Summary Judgment	56b
Certain Documents Attached to or Referred to in Affidavit of Thomas A. Tracy, Assistant Executive Secretary, National Mediation Board (155a-164a):	
Exhibit (1). NMB letter of April 24, 1963	58b
Exhibit (2). NMB telegram of May 8, 1963	59b
Exhibit (4). Statement of May 16, 1963 on behalf of American Airlines, Inc.	60b
Exhibit (5). American Airlines Telegram	71b
Exhibit (I). NMB letter of May 24, 1963	72b
Exhibit (9). Della Corte telegram of June 13, 1963	73b
Exhibit (L). NMB letter of June 5, 1963	74b
Crew Complement Document, December 1, 1962	75b
Portion of Affidavit of Counsel, March 13, 1963, Submitted in Connection with Motion for Reference to a Master	86b
Decision of the Civil Aeronautics Board in *FEIA, EAL* v. *Eastern Air Lines, Inc.*, ... C. A. B. ....., E-19923, August 19, 1963	87b

Opinion of the District Court.

Motions for Preliminary Injunction.

(191) * WYATT, District Judge.

This action and the controversies involved form chapters in the troubled history of labor relations in the airline industry. Specifically, there are charges here of violations of the Railway Labor Act (45 U. S. C. A. §151 and following: the "Act") which was made applicable (192) to the air lines by amendments effective April 10, 1936 (45 U. S. C. A. §181).

The action is for an injunction, declaratory judgment and damages and was commenced by President Ruby of Air Line Pilots Association ("Alpa") and by Alpa against American Airlines, Inc. ("American" or "the Company"). Intervention under Fed. R. Civ. P. 24(b) was permitted to President Manning of American Airlines Chapter, Flight Engineers' International Association (the "Chapter"), and to the Chapter; it was represented that there were questions of law and fact in common. The intervenors filed a complaint also for an injunction, a declaratory judgment and damages.

Thereafter intervenors applied under Fed. R. Civ. P. 21 to add as additional defendants Nicholas J. O'Connell, Jr., Chairman of the Alpa Master Executive Council of American pilots (the "American MEC"), and also the members of the Negotiating Committee appointed by the American MEC (the "additional defendants"). After this application had been granted, the intervenors and also plaintiffs served amended complaints, which added averments respecting the additional defendants; the motions are considered on the basis of these amended complaints. (193) The motions now to be considered (a motion by plaintiffs for summary judgment and a motion by defendant to strike an affidavit, etc. will be dealt with separately) are five in number:

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* The references are to documents listed in the first supplemental index to the record on appeal, Section E.

1. by plaintiffs for a preliminary injunction restraining American

a. from negotiating with the additional defendants as a committee of pilots;

b. from refusing to negotiate with Alpa;

c. from influencing, etc. its pilots in their choice of bargaining representatives;

d. from "subverting" the rights of Alpa as bargaining representative of American pilots;

e. from making any agreement as to pilots except with Alpa; and

f. from changing working conditions in violation of the Act;

2. by American for a reference to a master under Fed. R. Civ. P. 53 to determine whether "a majority of defendants' flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative",

3. by intervenors for a preliminary injunction restraining American

a. from negotiating as to flight engineers except with the Chapter;

(194) b. from making any agreement as to flight engineers except with the Chapter; and

c. from refusing to bargain collectively with the Chapter;

4. by intervenors for an order restraining all parties, including the additional defendants,

a. from disseminating a proposed agreement concerning flight engineers;

b. from holding any meetings for considering and voting on such proposed agreement; and

c. from influencing etc. the flight engineers in their choice of bargaining representative; and

5. by plaintiffs for an order restraining the additional defendants

a. from negotiating with American as to pilots;

b. from acting with respect to agreements negotiated by them with American;

c. from influencing etc. the pilots in their choice of bargaining representative;

d. from "subverting" the rights of Alpa under the Act;

e. from making any agreement as to American pilots (195) except through Alpa; and

f. from participating in any change in working conditions in violation of the Act.

1. Relationship between Alpa and American; Internal Structure of Alpa

Alpa is a national labor oganization organized in 1931 and with Home Office in Chicago. For many years, going back at least to 1939, there have been written agreements between American and its pilots, represented by Alpa. These agreements have been signed by the President of Alpa "for the air line pilots in the service of" American. The last agreement is dated, and became effective, January 21, 1959. It provides that it shall be renewed each year without change unless notice of an intended change is given by one party to the other under Section 6 of the Act (45 U. S. C. A. §156).

Alpa has been recognized by American for many years as the representative of its pilots. There has not been until recently any "dispute" concerning representation which would bring about a certification by the National Mediation Board ("NMB"; 45 U. S. C. A. §152 Ninth); the January 21, 1959 agreement recites that Alpa has given "satisfactory proof" of its representation but this recital is a carry-over from earlier years; no proof was in fact (196) given or required and there is no evidence that Alpa was ever chosen as bargaining representative for the American pilots by any ballot or other formal procedure.

The representation by Alpa with which we are here concerned is of American pilots only, and not of pilots on other air lines. This has been the past pattern, the agreements have been executed on such basis, and it appears to be required or contemplated by the Act (e.g., 45 U. S. C. A. §§151 Fifth and 152 Fourth and Ninth); Alpa policy is firm for negotiations "individually with each carrier" and against "industry bargaining".

In this connection, the internal structure of Alpa should be noticed.

For each air line, the fundamental unit is the Local Council, one of which is established at each important base of the air line. The Alpa members in each Local Council elect a Captain Representative and a Co-pilot Representative.

The Captain Representatives and the Co-pilot Representatives from all the Local Councils of an air line make up the Master Executive Council ("MEC") of that air line.

The MEC elects a Chairman (called "Master Chairman") (197) and a Vice-chairman.

For each air line there is also a Negotiating Committee, which under Alpa policy is selected or elected by its MEC; the Master Chairman is ex-officio a member of the Negotiating Committee.

Such was the Alpa organization at American. During the relevant period the additional defendant O'Connell was Master Chairman; the Negotiating Committee was composed of Lyons (Chairman), Guba, Garvey, Atkins, Miller (until his resignation February 18, 1963) and Master Chairman O'Connell (ex-officio).

The highest governing body of Alpa is its Board of Directors, made up of the Captain and Co-pilot Representatives of all the Local Councils of all the air lines whose employees are represented by Alpa.

The Executive Committee of Alpa consists of the officers, these being the President, First Vice-President, five Regional Vice-Presidents, a Secretary and a Treasurer.

There is also an Executive Board of Alpa consisting of the Chairman and Vice-Chairman of the Master Executive Council of each air line.

(198) 2. The Crew Complement Issue Between Alpa and Feia (or its local Chapters).

To act as pilot of any plane, large or small, requires possession of the appropriate certificate under applicable government regulations. There are various types of certificates, some of which are: student, private, commercial pilot, and airline transport pilot. A commercial pilot's certificate (and "instrument rating") is required to act as a pilot on a commercial passenger plane; the pilot in command must hold appropriate airline transport pilot certificates and ratings. 14 CFR §40.300.

The addition of a flight engineer to plane crews came about with the development of larger passenger planes during and after World War II. In 1948 new government regulations required that the crew of large planes include the holder of a flight engineer's certificate.

Some carriers, including American, then employed flight engineers with a mechanical background and a flight engineer's certificate but without pilot qualifications.

These flight engineers have been historically represented for collective bargaining purposes by Flight Engineers' International Association ("Feia"); the Chapter is the local unit for American, has been certified since 1955 by the (199) National Mediation Board ("NMB") as authorized to represent American flight engineers (45 U. S. C. A. §152 Ninth), and has had contracts with American concerning working conditions until the last contract expired according to its terms on April 30, 1963.

Other carriers employed as flight engineers qualified pilots who also held flight engineer's certificates. On such carriers, Alpa represented all crew personnel and there was thus one union in the cockpit.

On carriers such as American there were, as indicated above, two unions in the cockpit.

Applicable regulations require a crew of three for larger planes, including jets, and one crew member must have a flight engineer's certificate. All three *may* be qualified pilots, provided one has a flight engineer's certificate, or it is sufficient that two only are qualified pilots and that the third holds a flight engineer's certificate without pilot qualifications.

Alpa has vigorously fought for what it calls a "fail safe" policy under which all three members of the jet crew must be qualified as pilots (meaning possession of at least a (200) "Commercial Pilot's Certificate and Instrument Rating", usually referred to in short as "C and I"), even though one acts as flight engineer. Feia and its chapters fight against a requirement of any pilot qualification for the flight engineer. This issue is usually called the "crew complement" issue. While supported on each side by safety arguments, the difference in attitude between Alpa and Feia must be to some extent influenced by the struggle over jobs and union membership.

In order to keep labor peace, American and certain other carriers have been flying large planes with a crew of four (three qualified pilots and a flight engineer).

American and the other carriers so situated naturally and properly desire (and feel compelled by the laws of economics) to reduce the cockpit crews to three members as permitted by the regulations and as presently believed on all sides to be entirely adequate for safety.

It is this crew reduction and the handling of the third seat for the flight engineer which is the root cause of the present litigation. In particular, the immediate cause of controversy is that Alpa, a national organization, insists on a *national* policy that all three members of the reduced crew must have at least a "C and I"; the Negotiating Committee (201) for American pilots (despite this national policy of Alpa) was willing to agree with American that the flight engineer member need not have a "C and I" (while conforming with all governmental safety regulations) provided the American pilots secured benefits from American in return, such as reduced hours, etc.

3. Reports of the Feinsinger Commission.

On February 17, 1961, the flight engineers walked out on American and the other major air carriers similarly situated. This forced a virtual stoppage of air transportation.

The walkout resulted from a controversy before the NMB between Alpa and Feia.

Alpa had requested certification by NMB as representative of *all* cockpit crew members (engineers included) of United Air Lines. Feia contended to NMB that flight engineers were a separate "craft or class" (45 U. S. C. A. §152 Ninth) and should vote separately from pilots for representative.

NMB appointed "a committee of three neutral persons" (45 U. S. C. A. §152 Ninth), the Chairman being J. Glenn Donaldson, to decide this dispute.

(202) The Donaldson Committee on January 17, 1961 made a decision that all crew members in the cockpit—whether pilots or flight engineers—are "one craft or class"

and should vote together "on one ballot" for a bargaining representative.

This was, of course, a victory for Alpa and the walkout of flight engineers took place as a protest one month later.

On February 21, 1961 the President appointed a Commission, with Professor Nathan Feinsinger as Chairman, to investigate and report; the engineers returned to work.

The Feinsinger Commission made a preliminary report on May 24, 1961. The principal recommendations were:

a. that there be one union in the cockpit and that Alpa and Feia should merge;

b. that jet planes operate with a three man crew;

(203) c. that flight engineers on jet planes (subject to job protection in a transition period) be qualified as pilots (that is, have a "C and I"); and

d. that job equities of the then pilots and engineers be reasonably protected.

The President declared that the parties should "negotiate a final settlement of their differences on the basis of these recommendations."

The Feinsinger Commission submitted a supplemental and final report on October 17, 1961 which expanded some of its recommendations, principally (a) as to the detailed pilot qualifications to be expected of flight engineers on jet planes (which included possession of a "Commercial Pilot's Certificate and Instrument Rating") and (b) as to methods of protecting job equities.

The recommendations of the Feinsinger Commission did not lead to any quick agreement between the pilots, engineers and any air lines. There were further negotiations as to each air line.

For example, Pan American and Alpa, after much negotiation, accepted a request made by the President and on (204) April 17, 1962 agreed to arbitrate their differ-

ences. The Pan American engineers declined to arbitrate. This particular dispute engaged the attention in July 1962 of the Court of Appeals for this Circuit. *Pan American World Air* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 340 (2d Cir. 1962).

It proved impossible to settle in any way the disputes as between Eastern Airlines, its pilots and engineers. A crippling strike was started against Eastern by its flight engineers on June 23, 1962. Some aspects of this were before Judge Feinberg last year in *Flight Engineers Int. Ass'n EAL Chap.* v. *Eastern Airlines*, 208 F. Supp. 182 (S. D. N. Y. 1962), affirmed 311 F. 2d 745 (2d Cir. 1963).

The situation as to American will be examined in greater detail.

4. PILOT NEGOTIATIONS AND MEDIATION BEFORE THE TWA SETTLEMENT.

Negotiations began between American and its pilots (through Alpa) by the service of "openers" in March 1961 by American and by Alpa (acting through President Sayen) under Section 6 of the Act (45 U. S. C. A. §156). The American "opener" was addressed to the President of Alpa in Chicago.

(205) Meetings were held from time to time in 1961 between American (whose principal representatives have been Vice-presidents Whitacre and Lamond) and the Negotiating Committee. According to practice, the Alpa Home Office in Chicago participated in such meetings through a paid employee (called a "staff negotiator") who reported back to the Home Office. Harkenrider was Alpa staff negotiator with the American Negotiating Committee until withdrawn on November 28, 1962 as later described. It was not usual for any Alpa officer to take part in the negotiations, except in such a case as Miller who was an American pilot and member of the Negotiating Committee and was also a Regional Vice-president of Alpa.

Agreements were not reached in 1961 (possibly waiting on or observing the Feinsinger Commission) and on September 21, 1961 Alpa asked NMB for its mediation services.

On October 21, 1961, American notified Alpa that it accepted the recommendations of the Feinsinger Commission and added them to its Section 6 openers, specifically mentioning the crew complement recommendations.

The situation in American was importantly and significantly affected by the desire (known to the Alpa Home Office) on the part of American pilots for a reduction (206) in hours, an improved retirement plan, and other changes. Alpa President Sayen on November 7, 1961 wrote the NMB that the crew complement problems were "but minor issues on American Airlines" compared to the pilot proposals on retirement and working conditions. While American was willing to accept the Feinsinger Commission recommendations, it evidently did not feel that it could afford to train its flight engineers at its expense to comply with these recommendations and also at the same time grant to its pilots reduction in hours, better retirement treatment, etc.

A mediator from NMB (Michael or "mediator O'Connell", to distinguish him from the additional defendant O'Connell) had been designated in due course and was attending the pilot negotiations but by June 29, 1962 the pilot situation on American was at a stalemate. The pilots insisted on a reduction in hours, etc.; American insisted that it was impossible to grant these benefits in the face of the expected expense of training flight engineers to secure pilot qualification, the major expense being the qualification of flight engineers with a "commercial pilot's certificate and instrument rating". The mediator felt that an impasse had been reached.

On July 2, 1962, NMB notified the parties that (207) mediation had been unsuccessful and urged an agreement to arbitrate (45 U. S. C. A. §155 First).

American accepted the proffer of arbitration but on July 11, 1962 Alpa declined it.

NMB therefore on July 18, 1962 notified the parties that its services had terminated; this meant that after the thirty day period under the Act, the parties were free from the Act's restrictions (45 U. S. C. A. §155 First).

5. Flight Engineer Negotiations and Mediation Before the TWA Settlement.

The last agreement executed between the Chapter and American was effective May 1, 1958 and was to continue until April 30, 1963 except that "openers" under Section 6 of the Act were permitted to be served as to compensation provisions (Sections 5 and 6 of the May 1, 1958 agreement) to be effective not earlier than May 1, 1961. American by the agreement recognized the Chapter as "duly designated bargaining representative" of its flight engineers as certified by NMB (the certification had been made on May 25, 1955). Unlike Alpa which has Local Councils at each important base, the Chapter includes all flight engineers at all American bases.

(208) In February 1961, Section 6 "openers" as to compensation were served both by the Chapter on American and by American on the Chapter.

The Chapter had a Negotiating Committee on which were President Manning, Apkarian, Petree, and Simpson; unlike Alpa (where the Negotiating Committee was elected by the pilot's MEC), the flight engineers' membership at large elected the Negotiating Committee, the last such election having been held in March or April 1961.

There were negotiating sessions between the flight engineers and American in August and October 1961 but no agreement was reached, again probably because of the developments associated with the Feinsinger Commission.

There were other negotiating sessions in January and March 1962; the engineers believed, however, that American would not negotiate to a conclusion on their wages until the crew complement issue had been settled. Accordingly on March 14, 1962 the Chapter asked NMB for mediation.

Thereafter the NMB assigned Holaren as mediator and meetings took place; that these were unsuccessful was

doubtless because of the unresolved crew complement issue and the then pending proceedings in this connection before (209) Presidential Emergency Boards involving other air lines.

NMB recognized mediation as unsuccessful and urged an agreement to arbitrate (45 U. S. C. A. §155 First). On June 19, 1962 the Chapter refused arbitration and NMB then on June 21, 1962 terminated its services, leaving the parties—after the statutory 30 day period—free from the Act's restrictions (45 U. S. C. A. §155 First).

6. TWA Settlement and Resumption of Negotiations on American.

On June 21, 1962, then Secretary of Labor Goldberg was able to announce that TWA and its flight engineers had settled the crew complement issue, subject to ratification by the engineer membership. The settlement was made on the basis of the Feinsinger Commission recommendations, including an eventual merger of the TWA Chapter of Feia into Alpa and possession of a "C and I" by the flight engineer member of three man crews. Unresolved economic issues were to be arbitrated.

This TWA settlement came about after a serious situation had been created by a strike notice from its flight engineers to TWA and after an Emergency Board had been appointed by the President (on March 20, 1962) under Section 10 of the Act (45 U. S. C. A. §160).

(210) 7. Washington, July 1962—Pilots and Flight Engineers Meet Separately with American.

After the settlement between TWA and its flight engineers had been announced on June 21, 1962, the Labor Department officials wished to encourage a similar and prompt settlement on American. Among other reasons, this was expected to help toward ratification by the TWA flight engineers of the TWA settlement and to help toward

settlement on Pan-American and Eastern (whose flight engineers had rejected the TWA settlement and announced a strike for June 23, 1962, which began on Eastern but not on Pan-American); at the same time, a long range labor solution on American itself (a most important domestic carrier) would obviously be in the public interest.

After being so requested by the Labor Department, the Chapter (through its MEC acting unanimously) on July 6, 1962 approved the terms of the TWA settlement as a formula for settling the crew complement issue on American. The Secretary of Labor promptly announced this in a press release.

The Labor Department officials then requested the flight engineers and American to meet with them in Washington; they did so in the week of July 9, 1962.

These officials brought the Company and the flight (211) engineer's committee together for a series of meetings that week in Washington, proposing the TWA formula as the basis for crew complement settlement. The engineers were primarily interested in discussing wages at once, but little progress on this could be made; they were told by the Company to forget about crew complement until it could be negotiated with the pilots.

The Company representatives explained privately to the Labor Department officials that the problem on American was not so much with the engineers as with the pilots, this because the American pilots were far more interested in reduction of hours and other benefits (which would be very expensive for the Company) than in crew complement. In this connection, it was also explained that the American pilots as far back as 1958 had wanted a reduction in hours, etc. rather than the agreement for a four man crew, and that the agreement for a four man crew had been made by American with then President Sayen of Alpa. In fact, the American pilots had suggested to the Company as recently as May of 1962 that they were not interested in having the Company spend its money to qualify flight engineers

with a "C and I" under the Feinsinger Commission formula; they wanted a reduction of hours and other benefits instead.

(212) The Secretary of Labor, after considering this explanation by the Company, arranged to bring the pilots to Washington; in the week beginning July 16, 1962, representatives of the pilots, of the engineers, and of the Company were in Washington. Meanwhile, President Ruby of Alpa, had also come to Washington by request; he (a long time pilot for National Airlines) had just been elected in June as President of Alpa.

The engineers played little part in the Washington meetings which began July 16; they did not see the Company team at any time; they had one meeting with the pilots; and on July 20 they were excused by the Secretary while the Company and its pilots negotiated.

At the request of the Labor Department officials and with the participation of Chairman Edwards of NMB, the pilots and the Company worked steadily in Washington from July 16, 1962 until July 25, 1962.

The effort, under suggestions from Chairman Edwards, was first to try to agree on as many items as possible and leave to one side those items on which it appeared difficult to agree. Thus many provisions were in fact agreed upon, but these are of no significance here.

(213) Ruby of Alpa was present at many of these meetings and Harkenrider of Alpa was present at all of them (and at all other pilot meetings with the Company until his removal by Alpa on November 28, 1962); the agreed items were in fact initialed by Harkenrider for the American pilots.

The differences between the Alpa national organization and the Alpa local American organization—those differences which finally led to the present litigation—became more evident in Washington in July 1962 to those organizations, as well as to the Company itself.

For example, Ruby met informally with the Company and two of the chief pilot negotiators at the Hay-Adams Hotel on July 22. O'Connell, one of the chief pilot negotiators and now an additional defendant, there made it clear that his group was primarily interested in reduction of hours and other benefits and if it were necessary to save the Company money on flight engineer training in order to secure such benefits, his group would consider agreeing to a reduction in flight engineer training below that required for a "C and I" as recommended by the Feinsinger Commission. While thus put on notice, Ruby did not agree and stated a contrary Alpa position. O'Connell had earlier the same day in an open meeting, with Chairman (214) Edwards present, stated that the crew complement problem on American was "inversely related to reduction in hours".

The Washington meetings were adjourned on July 25 and, at the suggestion of Chairman Edwards, were to be resumed on July 31, in Fort Worth.

8. July 31—November 1 Negotiations Between Pilots and American.

The meetings in Fort Worth (July 31-August 2) between the pilots and the Company, with Chairman Edwards present, were significant because the basis was there established for all subsequent negotiations.

The pilots, through O'Connell, made a proposal during those meetings which (apart from details not here significant) was that if the Company would grant them reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a "C and I" (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with Alpa so that the Feinsinger Commission recommendation of one union in the cockpit would be accomplished.

This proposal came from the pilots, not the Company, and was often called "O'Connell's iffy"; in fact the pro-

posal (215) came from Alpa itself because the Negotiating Committee was at the time (and for a considerable period thereafter) functioning as an official Alpa bargaining committee with an Alpa Home Office staff member in constant attendance. Since the proposal conflicted, however, with the strong position theretofore taken by the Alpa national organization, the Company raised the question in Fort Worth and later whether the pilots could secure an Alpa approving signature. The pilots were apparently confident that the Alpa Home Office would go along and told the Company team that Alpa policy had been changed at its last convention and that they (especially Garvey) had a good deal to do with Alpa policy in this area. Moreover, Miller, a Regional Vice-President of Alpa, was a member of the pilots' Negotiating Committee and was at the Fort Worth and many other meetings; Harkenrider, the Alpa staff negotiator, was also there and at all other meetings until late November. The American pilots did not at this time contemplate any break away from Alpa.

The Company team was interested, felt that the one union condition was (among other things) highly important, and asked for a recess so that the cost of the proposal could be calculated.

(216) There was then a series of meetings between the Company team and the pilot's team at Washington, Los Angeles and New York.

These meetings, and all other negotiating meetings relevant here (except those about pilot-flight engineer merger into one union), were attended by Chairman Edwards of NMB or mediator O'Connell or mediator Schoonover; sometimes Chairman Edwards and one of the other mediators would both attend. All the negotiating meetings indicated were either arranged by, or the time and place had the approval of, the NMB personnel.

There were still many vexing issues between the Company and its pilots, even though their main objectives may have become common. For example, how much of a reduc-

tion in maximum work hours per month should be made? The pilots wanted a low figure, the Company a higher figure than the pilots.

Finally, in middle or late September, the Company and pilots felt sufficiently agreed in principle that they suspended their meetings to permit O'Connell and his pilot committee to deal with the flight engineers and bring about their agreement to the contemplated arrangement with the Company and to a merger agreement with Alpa.

(217) 9. PILOTS-FLIGHT ENGINEERS TALK MERGER; JULY-NOVEMBER 1962.

In mid-September 1962 when the settlement plan proposed by O'Connell in Fort Worth had thus been made the basis of an agreement with the Company in principle, the pilots turned to talks with the engineers in order to secure their acceptance of the plan, including merger with Alpa.

An opening had already been made for these talks. O'Connell had explained his plan to Chapter President Manning in July even before presenting it to the Company. The day after the Fort Worth meetings adjourned, O'Connell and Harkenrider met in New York (on August 3) with Manning and with Chapter counsel; they also met in Los Angeles with Manning alone before the talks there on August 29 and 30 between the pilots and the Company.

The engineers were certainly prepared to accept as satisfactory everything to be done by American under the O'Connell plan. While they had accepted the recommendations of the Feinsinger Commission, the requirement of a "C and I" for the flight engineer was no article of faith with them; quite the contrary. Accordingly, if the pilots were willing to agree with the Company to eliminate this particular recommendation, the flight engineers would have no objection.

(218) Acceptance by the American Chapter of the Feinsinger Commission recommendations had meant acceptance

of the principle of one union for all cockpit employees. To put this principle into practice, however, was a matter of some difficulty.

From about mid or late September 1962 to the end of October 1962, the pilot's committee and the flight engineer's committee met in New York (no mediator or any other third persons being present) and discussed the terms on which the Chapter would be merged into Alpa. The flight engineers did not negotiate with the Company during this period, but talked with the Company team on September 21 and in mid-October to confirm the Company's attitude as reported by the pilots and to exchange general views.

The merger negotiations were based on merger of the Chapter into Alpa and its constitution, by-laws and policy manual—at the insistence of the pilots—were to be controlling. The flight engineers were told by the pilots, as the Company had been told, that Alpa would go along with an agreement even though a "C and I" for all crew members was not required.

By the end of October, an agreement of merger had (219) been almost completed, but some important points had not been resolved.

One of these was the pay relationships between flight engineers and pilots. The engineers were giving up to Alpa their separate representation as against the Company, so that after the merger wages for engineers would be negotiated by Alpa. There are about 600 flight engineers employed by American as against about 1600 pilots. It was therefore desired to put into the agreement some percentage figure as the minimum relationship between the two pay scales, so that there could be some standard for future negotiations. It proved impossible to agree readily on this percentage figure, but it was agreed between pilots and engineers that the Chapter negotiating committee would separately negotiate with American on engineer wages for the contract then to be made, and that the engineer wage thus negotiated would form the basis for the pay relationship with pilots to be inserted in the merger agreement.

By the end of October and after much time had been spent by the pilots and the engineers trying to agree on all points, the Company appeared impatient to start formulating a crew complement agreement. At the suggestion, or at least (220) with the approval, of Chairman Edwards, the pilots and engineers agreed to put their merger talks to one side for the time being and to sit down with the Company on the crew complement issue.

10. First Joint Pilot-Flight Engineer Negotiations with American; Crew Complement Agreement of December 1, 1962.

The first meeting of the Company jointly with the pilots and the flight engineers was on November 1.

Reports as to the merger negotiations of the two unions were made to the Company by O'Connell for the pilots and by Manning for the engineers. It was plain from these reports that merger was still a thing of the future.

Manning explained the understanding of the engineers: that, although a crew complement agreement was now to be discussed, it was to be effective only as part of an overall agreement which would include merger agreement between the two unions, a basic working agreement for pilots and engineers (including pay provisions for engineers), etc. Either Manning or Schwartz (Chapter counsel) or both referred to the fact that both pilots and engineers would be "pilots" under the contemplated arrangements, all would be one, and O'Connell would speak for all in the negotiations.

(221) The crew complement discussions lasted off and on all during November. The engineers spoke frequently for themselves, their counsel likewise. The pilots and the engineers made separate written proposals to the Company.

These discussions finally resulted in an agreed document setting forth the provisions to govern the crew complement reduction from four men to three men. This document was initialed on December 1, 1962 by O'Connell for the pilots, by Manning for the engineers, and by Whitacre for

the Company. The initialed document was then given to mediator O'Connell, who later gave it to Chairman Edwards.

Harkenrider, the Alpa staff negotiator, had been withdrawn (for reasons shortly to appear) by Alpa on November 28, 1962, just before the initialing.

The December 1 crew complement document was drawn as a "memorandum of agreement" between, and to be executed by, the Company, Alpa and the Chapter. Some of its important provisions were:

a. the Company can convert to a 3 man crew on jet planes;

b. the present American flight engineers are "pilots" under the agreement; when serving as flight (222) engineers in a 3 man crew they are called flight officers; and they may qualify by having "any type of pilot certificate" (that is, less than a "C and I"; for example, a student's certificate) and by taking certain prescribed training;

c. the present American flight engineers are to be consolidated with the pilots "into one unit . . . for the purpose of collective bargaining representation" and it is represented that a majority have chosen Alpa "as their exclusive collective bargaining representative"; and

d. the Chapter "irrevocably relinquishes any right it may have to represent employees of the Company" and "acknowledges" that the Company may treat Alpa as the "exclusive collective bargaining representative" of the present American flight engineers.

The December 1 crew complement document settled many of the important and vexing problems as between American, its pilots and its engineers but—whatever the significance of the initialing may have been—it was, as Whitacre testified, "subject to a complete agreement". That "complete agreement" has never been reached.

(223) Nothing which was said or done in these joint negotiations justified the company in believing that the engineers had given up their representation rights to a "joint committee" or otherwise. It was clear that the giving up would only occur *after* a complete and overall agreement had been reached by all parties, which unfortunately never came to pass.

11. Rift Within Alpa; Recess of the Negotiations in December.

From at least August 2 (Fort Worth), the Alpa national organization and the Alpa local American organization were each set on a collision course. Only a change of direction by one or the other could have avoided the collision, the legal effects of which are now to be determined.

The Alpa national organization was insisting that each member of a 3 man crew must have a "C and I". Any chance of a relaxation of such policy or of a compromise by Alpa disappeared with developments on the other large air lines.

On September 25, 1962, an agreement was executed by Ruby (for Alpa) acting for all TWA pilots, and by TWA, providing (among many other things) for a "C and I" for all members of a 3 man crew on TWA. The TWA engineers ratified (224) the settlement and executed their agreement on November 21, 1962.

On September 27, 1962, Ruby had executed a similar agreement (for Alpa) acting for all Pan-American pilots.

After the strike of flight engineers on Eastern (which began June 23, 1962) had dragged on for several months, Eastern made some arrangement with Alpa under which pilots (with the necessary flight engineer's certificate) took over the seat of the flight engineer; thus on Eastern all members of a 3 man crew have at least a "C and I".

According to Ruby, by January 1963 all of the air lines except American and Trans Caribbean were operating

under a "C and I" requirement for all members of a 3 man crew.

Against this background, it seems clear that Alpa as a national organization would find it difficult to make a policy exception so that American would be the only major air line without the expensive "C and I" requirement for flight engineers.

The elected representatives of the American pilots (its Alpa MEC) and the appointed Alpa Negotiating Committee were ready and willing, however, to make a trade with American (225) under which they would receive a reduction in hours and an improved retirement plan against waiver of any "C and I" requirement for the flight engineer. There is nothing surprising or unreasonable about such an attitude.

The Company thus found itself between these two opposing positions, but would naturally attempt to find an accord with its own employees. It therefore accepted in principle the proposal made by its pilots, as an Alpa Negotiating Committee, in Fort Worth about August 1.

Ruby did not learn of the Fort Worth proposal until about the middle of September. He then promptly sat down with the American committee and made it clear that he would insist that a "C and I" for the flight engineers be part of any settlement. The pilots insisted that they preferred, and would demand, a reduction in hours. Ruby apparently felt that both were possible; in this, he was mistaken.

In October, Ruby had apprehensions as to the course of negotiations and asked O'Connell to attend an Alpa Executive Committee meeting in Chicago on October 23. O'Connell did so. He apparently gave the position of his group with frankness, because Ruby says the Executive Committee then "found out definitely" that the American pilots (226) were not insisting on a "C and I" for the flight engineer. The Alpa Executive Committee adopted a resolution informing the American pilots that Alpa policy

"requires a Commercial and Instrument Rating" for the third crew member and that "this concept must be met". Hiller was the only pilot from American on the Executive Committee and if present at the meeting he abstained on the vote.

Ruby met with O'Connell and the American Negotiating Committee on November 1 and 2 and again asserted their obligation to follow Alpa "mandatory policy" as to flight engineer qualifications. Ruby outlined his idea of how they should negotiate, they agreed to try it out, but Ruby could see that they were reaching an "adamant position".

As November wore on and the American pilots remained "adamant", Ruby again referred the matter to the Alpa Executive Committee which on November 27 advised that Harkenrider be removed as staff negotiator with the American pilots because of his failure to reflect the October instructions from the Executive Committee (Harkenrider attended no American negotiating sessions after November 28). The Alpa Executive Committee also declared that "continuation of negotiating sessions inconsistent with Alpa policy is already (227) destructive and intolerable". On the same day (November 27) Ruby sent a telegram to Chairman Edwards asking that the American negotiations "be suspended", but no such suspension in fact took place; on the contrary, the negotiations continued until the initialing of the December 1 crew complement document was accomplished, and for a few days thereafter.

On the same date—November 27—the Alpa Executive Committee asked the American Negotiating Committee and Harkenrider to appear before them the following day. Harkenrider did appear and gave a complete report; O'Connell and the rest of the American Committee did not appear. The Alpa Executive Committee adopted resolutions that the American negotiations "be recessed . . . until . . . there is complete understanding as to the direction of such negotiations and a resolution of the controversy on crew complement" and that "such understanding be in writing".

Miller, the only American pilot on the Executive Committee of Alpa, was apparently not present; those voting were all of air lines other than American.

After sending copies of the resolutions to O'Connell, Ruby again met with him and the Negotiating Committee on December 5 and 6. Ruby was unable to get any satisfactory (228) "understanding . . . in writing" from the Negotiating Committee.

Ruby also went with O'Connell on December 6 and had a discussion with Whitacre. It is not clear to what extent Ruby was told of the December 1 initialed document; certainly he was not given a copy of it. The point seems without much significance because in any event Ruby had full knowledge of the negotiating attitude of the American Committee, namely, that they would not insist on a "C and I" for flight engineers.

At the December 6 discussion with Whitacre, he and Ruby did agree (over the objections of O'Connell) that the negotiations would stand in recess—with the approval of Chairman Edwards—until some time in January.

12. Final Split Within Alpa; the Company Decides to Continue Negotiations with the Committee of its own Pilots

The American MEC met in Chicago on December 11, 12 and 13. Ruby was with them on several occasions; the old ground was covered; there was no change. It was agreed, however, that the American MEC would meet in joint session with the Alpa Executive Committee.

Ruby then on December 19 called in the Master (229) Chairman of the thirteen air lines flying jet planes, including O'Connell of American; Ruby asked if he had been correctly stating Alpa policy and he gave O'Connell an opportunity to explain the American Committee's views. Eleven of the Master Chairman declared that Alpa policy required as a minimum a "C and I" for all flight engineers; O'Connell and another dissented.

On January 3, 1963, the Negotiating Committee met with Whitacre on an unrelated matter (the "wet lease"); at that time O'Connell told Whitacre that the American MEC had directed that negotiations be resumed on the same basis as before the recess. Whitacre said the Company was not in a position to resume negotiations until more had been heard of the American Committee's status and until Whitacre could talk it over with Chairman Edwards.

The American MEC met in Chicago again from January 8 through 11, 1963, with some 22 members present. The MEC met separately, met with President Ruby, and met jointly with the Alpa Executive Committee. Ruby stated perfectly clearly the "mandatory policy" of Alpa to require a "C and I" for flight engineers and he reminded the American pilots that there had never been an agreement on (230) any air line "which contemplated less than a commercial license and instrument rating for the third crew member on jet equipment".

The American pilots were equally clear and were "adamant". The American MEC at Chicago resolved unanimously and "speaking for the entire AAL pilot group" to authorize the Negotiating Committee to conclude an agreement with American without requiring flight engineers to have a "C and I". The American MEC further authorized the Committee to advise the Company that the pilots were "agreeable to implementation of said contract with or without formal approval of the Alpa". The American MEC declared that the pilot group had "no intention of giving up demands regarding reductions in flight time and duty formulas that have been successfully negotiated".

At this point, the split between the American MEC and the Alpa national organization became complete and it later proved to be final.

On January 11, Ruby notified the American Negotiating Committee that no negotiations could take place without "prior approval" of Ruby himself. He also gave notice that such "prior approval" was required before Alpa

would (231) reimburse the Negotiating Committee members—as had been the practice in the past—for their expenses and for loss by them of flight pay while acting as negotiators.

Under date of January 11, Ruby also notified the President of American that any negotiations with its pilots had to be "with the presence and consent" of Alpa and that further negotiations could only take place by "arrangement" with Ruby.

On January 11 at New York, O'Connell again asked Whitacre to resume negotiations with his committee. This time he told about the American MEC resolutions at Chicago and also said that any agreement reached would be submitted for ratification by 75% of American's pilots; he asserted confidently that this could be secured easily.

Whitacre then on January 15 exp ined the situation to Chairman Edwards, who advised in substance that the Company had no choice but to resume negotiations with the American Committee, that it was the same committee as before and that there was no other committee with which to negotiate. Testimony by Whitacre to this conversation was received over objection by plaintiffs and intervenors that it was not binding and was hearsay and further that Chairman Edwards could not, (232) or would not, be called by them to testify because of a suggested privilege arising from NMB regulations. These objections are not believed to be well taken, but even had the testimony been excluded the conclusion would be the same. The record shows without contradiction that when, as will be seen, the Company did resume negotiations with the American pilot committee, Chairman Edwards or another NMB mediator (Schoonover at this period) was always present, or both together were present. This in itself shows an approval by the mediators of the course which the Company decided to follow; such an approval has no force as a matter of law but is significant in determining the Company's good faith.

On January 16, O'Connell, as Chairman of the American MEC, sent a letter to the President of American containing the text of the American MEC Chicago resolutions and repeating in substance what had earlier been told to Whitacre about resuming negotiations.

On January 16, 1963, negotiations were in fact resumed between the Company and the pilot's negotiating Committee; the composition of the committee was the same, except that Miller was away on a trip to Africa; neither Harkenrider (who had not been a member of the committee) nor (233) any other Alpa employee was present.

On January 17, 1963, the engineers negotiating committee joined the negotiating group.

It was therefore the Company's decision, on or about January 16, 1963, to negotiate with the American pilot's committee despite the opposition and warnings of Alpa. The Company refused to bargain with the Alpa national organization; it decided to bargain with the negotiating committee of its pilots, which committee had been chosen under Alpa auspices and procedures.

13. American had Reasonable Grounds to Believe that the Negotiating Committee Represented a Majority of the "Craft or Class" of its Pilot Employees and Acted in Good Faith in Continuing to Deal with that Committee so far as Pilots are Concerned.

Whether the Company acted in good faith in continuing to bargain with the Negotiating Committee appears to be an issue of fact. Consideration of all the evidence, including that contained in the foregoing recital, leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees.

(234) The question before the Company under the Act was: who was the "representative" of the "craft or class" of American pilots, the American Negotiating Committee or the Alpa Home Office?

The credentials of the American Negotiating Committee were far more impressive in this respect than those of the Alpa Home Office.

The Negotiating Committee had been selected by the American MEC and in effect the Company was dealing with the American MEC itself, since the Committee reported to and received instructions from the MEC and the Master Chairman was a member ex-officio of the Committee. The American MEC was made up of the *only* representatives *elected* by American pilots; during the dispute with the Home Office, elections of such representatives by American pilots continued to take place at six months intervals, one-third being elected each six months, the most recently elected representatives taking office on October 1, 1962, and April 1, 1963. The MEC, according to Alpa policy, is "the highest governing body" for the pilots on an air line; likewise, elected representatives must represent "their constituents" according to Alpa policy and failure to do so is said to be against the interests of (235) Alpa itself. The American MEC supported, approved and ratified all that its Negotiating Committee did.

The Alpa Home Office and its several members who had discussions with the Company—Ruby, McMurray and Christie—were not employees of American and had not been elected by American pilots. In fact, the decisions made by the Alpa national organization were made by pilots from air lines *other* than American. This is to be considered in the context that under the Act representatives of employees in the air line industry have been selected on an individual carrier basis and negotiations conducted on an individual carrier basis; this is, moreover, a part of Alpa policy which specifies that negotiations must be carried on "individually with each carrier".

The Committee with which the Company elected in January 1963 to continue to deal was exactly the same committee with which it had been dealing all along—a committee which, so far as American could tell, had the con-

fidence and approval of the Alpa Home Office until January 1963.

It was not the Company which caused the split between the Committee and the Alpa Home Office. The proposal (236) to require of flight engineers less than a "C and I" —over which the split occurred—was not made by the Company but by the Negotiating Committee of the pilots, and at a time when this Committee was officially representing Alpa and with an Alpa staff negotiator in attendance.

Nor did Alpa ever present the Company with any feasible alternative to continuing to deal with the old Committee. No new or substitute committee was ever presented to the Company by Alpa, and both uniform past practice as well as Alpa policy required that negotiations be conducted for the American employees by a committee from such employees. The outside national officers and staff members of Alpa were never authorized to carry on negotiations for American pilots, and they never undertook in this instance to do so.

Under the circumstances, it seems impossible for Alpa to have produced a proper Negotiating Committee, other than that already in existence. The Alpa Policy Manual makes it clear that

> "The MEC shall appoint or elect the members of the Contract Negotiating Committee."

The American MEC had in fact appointed the Committee with which the Company dealt and, supporting that Committee fully, (237) was not likely to appoint another, either at the request of the Alpa Home Office or otherwise.

All past contracts had been negotiated by the Company with just such a Committee and no President of Alpa had ever refused to sign a contract so negotiated. Indeed, a minor agreement—respecting the "wet lease" by American to British West Indian Airways—was negotiated with this very Committee as late as January 1963 and signed for Alpa by President Ruby.

The Company never suggested that its pilots leave Alpa, and certainly never made it any condition of its promises that a separation take place. The Company was ready at all times to sign an agreement with Alpa, but the Alpa Home Office would not sign the agreement as negotiated with the Committee representing American pilots. There may have been good reasons for the attitude of the Alpa Home Office, but with these or the merits of the dispute otherwise this Court can have no concern. To give the Alpa national organization, controlled by employees of other air lines, a veto power over contracts negotiated by the American pilots who must work under the contracts is not consistent with democratic procedure on the American air line system itself.

(238) This is especially true when it is considered that Alpa, as a bargaining representative, is an agent only; it is the American pilots themselves who are the principals. The execution of past agreements bears witness to this; they are signed by the President of Alpa "for the air line pilots in the service of American Airlines, Inc." The elected American MEC is much closer to the pilot principals than the Alpa Home Office and national organization.

Moreover, it was represented to the Company by the Committee that discussions at the Local Council level had shown a unanimous support for the Committee which could "very easily guarantee" at least a 75% approval by the pilots of any contract negotiated. There seems to have been no reason whatever for the Company to doubt this.

The Company, without any certification or election or other form of choosing by its pilots, had for a long period recognized Alpa as bargaining representative. There seems nothing to prevent the Company in good faith from withdrawing such recognition on the basis of new and convincing evidence.

Finally, the actions of Chairman Edwards and his NMB associates must be taken into account. These could not (239) make legal what was illegal, but on the issue of good

faith in a difficult situation they are not without significance and add to the impression that the Company acted properly in its dealings with the pilots.

14. Further Steps by Alpa; Commencement of This Action.

It may be convenient at this point to refer to the next steps of Alpa before the institution of this action.

Under date of January 18, Ruby sent telegrams to Chairman Edwards and to the Company declaring that the American pilot's committee had no authority to speak for, or to conclude any agreement for, American pilots and that the resumed negotiations were in violation of the Act. On the same day Ruby wrote to the Company (copy to Chairman Edwards) drawing attention to a provision in Alpa's constitution and by-laws requiring approval of the Executive Committee of Alpa or of its president before negotiations can be initiated or agreements executed.

The Company's reply to Ruby (dated January 18) included a statement that Chairman Edwards was present at the resumed negotiations and "advises that the parties should continue to bargain".

(240) Under date of January 24 Ruby then sent three letters: (a) to the Company, again warning that dealing with the pilot's committee was unauthorized and illegal, and asking for a meeting on January 30 "to negotiate an agreement between the Association [Alpa] and your Company"; (b) to O'Connell calling upon him and the Committee "to desist immediately" from the resumed negotiations; and (c) to President Manning of the Chapter, giving him copies of the earlier correspondence, and declaring the resumed negotiations "not authorized" by and not "binding" on Alpa.

The reply of Manning to Ruby (dated January 28) stated that the Alpa split "certainly ends our consideration of merger between the two organizations [i. e., Alpa and the Chapter] for the time being". It referred with some

bitterness to Alpa's "failure to intervene" at Eastern Airlines, where pilots eventually took over the jobs of the flight engineers. It warned that for Alpa to "press" its disagreement with the American pilots might lead to a strike or to lengthy litigation, either of which would be "unfortunate", and it suggested a request for help to the Secretary of Labor and to Chairman Edwards.

(241) The reply of the Company to Ruby (dated January 28) expressed a willingness to "confer generally" on January 30 but in effect refused to negotiate with Ruby—"a separate and duplicating negotiating session". The reply also stated that whether Alpa became a party to any agreement negotiated by the American pilots was "an internal matter" for Alpa.

A meeting between Ruby and the Company did take place on January 30, but (as might have been expected) it solved nothing. Apparently Ruby tried to get a negotiation started between American and the Alpa Home Office, but he was not successful. The Company asked how another committee of American pilots could be designated; according to all past Alpa practice, negotiations were conducted by a committee of pilots employed by the particular air line and appointed by the MEC, and such a committee was already in existence. Ruby evidently had no solution for this problem; he contemplated "bringing the existing committee in or whatever arrangement was necessary". The fact is that no substitute or other committee was ever appointed or arranged for by Alpa.

Ruby next instructed Christie, Director of Agreements for Alpa (a staff member), to present himself to American as "the duly appointed Representative". The efforts (242) of Christie were not successful. He went to New York but apparently did not attempt to enter the negotiating sessions. At the suggestion of Chairman Edwards, American officials talked to Christie (with mediator Schoonover present) but nothing came of it.

The Executive Board (as distinguished from the Executive Committee) of Alpa met at Chicago on February 5, 6 and 7. There were about 86 persons in attendance, including O'Connell; also present were other members of the American pilot's committee and of the American MEC. The Executive Board adopted resolutions (a) endorsing Ruby and his interpretation of Alpa policy; (b) declaring that the American MEC and Negotiating Committee "are not the bargaining representative of the American pilots"; (c) directing Ruby or his representatives to negotiate and conclude an agreement with American; and (d) finding the acts of the American MEC and Negotiating Committee "not in the best interests of Alpa".

Under date of February 8, Ruby sent copies of the resolution to the Company, to O'Connell, and to the American MEC.

The Company's reply again stated that it had "no choice but to go ahead (that is, to continue negotiating (243) with the committee of American pilots), again referred to the advice of Chairman Edwards that it do so, and expressed an inability to see any "way in which separate negotiations can be started".

On February 16, Ruby (accompanied by Alpa counsel) discussed the situation in New York with Company officials. The latter stated that the Company had wanted an agreement with Alpa, was sorry to be in the middle of such a problem, but as between Alpa and the Company's own pilots felt obliged to deal with its pilots.

On February 19, Ruby authorized McMurray and Christie (two staff members of Alpa) to try to start "proper negotiations" with American.

On February 21, McMurray and Christie appeared at a negotiating session in New York. Garvey (a member of the pilot's committee) asked Christie to leave. He and McMurray both left and shortly afterwards McMurray returned with Chairman Edwards and Whitacre. McMurray remained in the session for a while and then left, but

before leaving stated that the pilot group did not represent Alpa and that the negotiations were illegal, to which Chairman Edwards took exception.

(244) There were no further contacts by the Alpa national organization with any of the parties and this action was commenced by Alpa on March 1, 1963.

15. Resumption of Joint Pilots—Engineers Negotiations with the Company; the Substitute Pages; Joint Negotiations Ended by Engineers

After the Company had decided to bargain with the pilot's Negotiating Committee rather than with the Alpa Home Office, meetings began on January 17, 1963, between the Company and the two committees, one for pilots and one for engineers.

The assumption in these negotiations was that the two unions—one for pilots and one for engineers—would be merged into one union in the cockpit and that one agreement (that being negotiated) would cover both pilots and engineers.

Until a merger agreement between the two unions had been made, there necessarily was separate bargaining representation for pilots and for flight engineers. While the negotiating sessions were at times joint and while O'Connell at times acted as chief spokesman for the two committees, it was understood between them that the flight engineers would negotiate their own wages and that their separate representation (245) had not been given up. This was an entirely natural arrangement, not only because at that stage the engineers did not want to put themselves entirely in the hands of the pilots, but also because the pilots themselves hesitated to assume such a responsibility.

Thus as between pilots and engineers, there was no question but that the Chapter continued to be the representative of the engineers. The pilots did not purport to act for the engineers. As O'Connell testified: "We con-

sidered ourselves the pilot committee". The pilots never used the expressions "joint committee" or "joint negotiating committee". Especially considering the tentative and dependent character of the arrangements being worked out, there was no reason for the Company to suppose that in advance of complete agreement the flight engineers had given up their separate representation.

a. The Substitute Pages

During the resumed meetings in January 1963, it became apparent to the pilots and to the Company that execution by Alpa of the agreements being negotiated was highly doubtful, to say the least. The letters from Ruby of January 11 and 18 and his telegram of January 18 gave added confirmation.

(246) The December 1, 1962 "memorandum of agreement" covering crew complement had been drawn up for execution by Alpa (for the pilots) and contained a provision by which the engineers would give up their bargaining representation to Alpa. Feeling that Alpa participation was now not to be expected, the Company prepared new and substitute pages for those pages of the December 1, 1962 crew complement agreement on which the name of Alpa had appeared. This involved a change in the provision for the future merged union of pilots and flight engineers (because it had been assumed that the merger would be with Alpa) and thus for the future bargaining representative of the engineers. The new language proposed by the Company took account of the fact that it was not then known how the place of Alpa would be filled—what the organization would be. The new language in the substitute pages was that the engineers and pilots should be "consolidated into one craft or class unit", that the engineers agree that "their collective bargaining representative hereafter shall be the same as that which now or in the future is recognized by the Company as representing a

majority of its cockpit crew members", and that the Chapter gives up its representation rights to "said cockpit crew representative".

(247) These substitute pages were given by O'Connell to the engineers on January 24, were objected to strongly by the engineers, and were the subject of heated controversy with the Company until February 20. The position of the engineers was that under the substitute pages they were asked to give up their representation rights to whatever group the American pilots (or their then committee) decided, that this was an "unknown", and that before they would give up their representation rights they wanted to know with what organization they were dealing and also (importantly) the terms of their merger into such organization.

The Company asked Chairman Edwards for a letter approving the substitute pages but he felt unable to comply. Efforts through language revisions to overcome the objections of the engineers were not successful. On February 20, the Company withdrew the substitute pages and stated that it would stand on the December 1, 1962 wording of the crew complement agreement. This left the situation far from clear, because the December 1 wording was designed for execution by Alpa and if Alpa did not execute the document, it would be in major respects frustrated.

b. Dispute Over Representation of Engineers and end of Joint Meetings.

Meanwhile a further controversy arose between the (248) Company and the engineers. On January 31, the negotiations reached the subject of pay and retirement provisions for the engineers.

The basis of these negotiations was that one agreement would cover both pilots and engineers, who would belong to one union; indeed, the engineers were included under the term "pilots" in the draft agreements then being discussed.

The bringing of the pilots and engineers into a single representation was one of the advantages to the Company for which it was bargaining and making concessions.

The Company took the position that on and after November 1 the pilots and engineers were *already* one and that the engineers for collective bargaining purposes were being represented by a "Joint Negotiating Committee", of which O'Connell was chairman or spokesman. Accordingly, the Company position on January 31 was that pay and retirement provisions for engineers were matters for negotiation with the "Joint Negotiating Committee" and not with the engineers' committee separately; the Company declined to negotiate with the engineers' committee separately.

The engineers vigorously contested the Company's position and both verbally and in writing asserted the (249) continuing representation by the Chapter of the engineers as "a separate bargaining unit under the Railway Labor Act".

If there had been no dispute within Alpa itself, probably the engineers and the Company could eventually have found a compromise. But the difficulty was that Alpa and the American pilots had split, and in these circumstances the engineers were unwilling to give up their representation to the "unknown". The Company insisted without justification that they had *already* given up their representation to the "Joint Negotiating Committee".

Doubtless the attitude of the Company was influenced by a feeling that it was unfair for the engineers to demand separate representation while at the same time demanding, or expecting, the benefits promised by the Company in exchange for single representation of pilots and engineers.

Be that as it may, the fact is that the engineers had clearly not given up their separate representation, either to the "Joint Negotiating Committee" or otherwise. There is no evidence that the Chapter ever gave up its representation of the engineers; to the contrary, the evidence is that

until a merger with the pilots had been brought about, the Chapter (250) was to continue as before. That O'Connell or other members of the pilots' committee were requested, or permitted, to speak or to make proposals for the engineers was a matter of procedure, not of substance, and did not amount to any relinquishment or transfer of the Chapter's rights.

The joint sessions continued until February 21—the day after the withdrawal of the substitute pages—but the unresolved conflict between the position of the engineers and that of the Company finally resulted in refusal by the engineers to accept the demand of the Company for "joint committee" bargaining only; the engineers attended no joint sessions after February 21.

c. Events Leading up to Intervention by Engineers in This Action.

On February 26, the Master Executive Council of the American engineers had a meeting in Los Angeles. Whitacre and O'Connell were invited, and they addressed the meeting on separate occasions. Among other things, Whitacre indicated that the Company would continue its negotiations with the pilot committee until agreement was reached; that he had a lingering hope of acceptance by Alpa of such an agreement, even without the "C and I"; that if not and if the American pilots left Alpa and formed a separate organization with the engineers, (251) they would be better off and Alpa would later ask them to come back; and that he felt the Company had an agreement with the engineers on many important points, but was not "holding anybody to it". O'Connell said he hoped the engineers would accept the agreement negotiated by his Committee.

At this meeting in Los Angeles on February 26, the engineers' MEC resolved to ask the help of top officials of the AFL-CIO to resolve the several intra and inter union disputes. These officials made an effort, but there was no success.

Chairman Edwards then attempted to bring the engineers and the Company together again; meetings were held with him by the Company and the engineers on March 6, 8 and 12. The Company would not call these meetings "negotiations" because it maintained the position that it would negotiate with the flight engineers only through the "Joint Negotiating Committee"; the Company called these March meetings "bull sessions" and although many ideas were exchanged, nothing was settled.

Under the May 1, 1958 agreement between American and the Chapter, notice of intended change under Section 6 of the (252) Act could be given as to any provisions of the agreement (whether related to compensation or not) at least 60 days before its expiration on April 30, 1963. Under date of February 28, 1963, the Chapter gave notice to the Company of a desire to change numerous sections of the May 1, 1958 agreement, including sections 5 and 6 as to compensation and as to which notices of intended change had already been served by the Company and by the Chapter in February 1961. The Chapter suggested that a meeting to negotiate could "take place at any convenient time satisfactory to the Company".

Under the same date of February 28, 1963, the Company gave notice to President Manning under Section 6 of the Act of its intended changes in "existing agreements". The Company referred, however, to "current negotiations with the Joint Committee of pilot and flight engineer representatives" and suggested that bargaining "continue under the auspices of the Joint Committee and Mr. Leverett Edwards".

The Chapter, under date of March 7, 1963, notified the Company that it would not bargain through any "Joint Negotiating Committee", that there had been no transfer or release of its rights as bargaining representative of the engineers, and that agreements as to the engineers were (253) therefore required to be negotiated with it; the Chapter stated that it was prepared to meet with the Company "immediately".

There was no response by the Company, which apparently maintained its position of bargaining with the flight engineers only through the "Joint Negotiating Committee".

The Chapter and its president then moved for leave to intervene and serve a complaint in this action. The motion was granted on consent on March 19, 1963.

March 22, 1963, the Chapter notified NMB that it would agree to arbitrate all issues in dispute with American. On March 28, 1963, American notified NMB that it would not arbitrate, because the Chapter's agreement to arbitrate came too late (after its June 19, 1962 refusal) and that intervening events had made arbitration "inappropriate".

"16. The Company and Pilots Reach Agreement on March 15

Despite the withdrawal of the engineers from the joint sessions, the Company and the pilots' committee continued their negotiations for an overall agreement (or group of related agreements), including provisions (254)' affecting the engineers.

During these negotiations and on March 5 and 6, O'Connell reviewed the situation with seven former American MEC chairmen (going back to 1941 or 1942) and with Chairman Edwards. The former MEC chairmen gave O'Connell a written statement approving his efforts to secure a new agreement with the Company and declaring that "nothing should be allowed to delay or interfere with the implementation of this Agreement".

On March 15, the negotiations were concluded and all agreements were then in form satisfactory to the Company and to the pilots' committee (these agreements will be sometimes referred to for convenience as the "March 15" agreements).

There was a so-called "basic working agreement" and related supplementary agreements, including that covering the crew complement question. The March 15 basic work-

ing agreement covered both pilots and engineers, as to compensation and everything else; the engineers are called "Flight Officers" and are also included in the term "pilot"; this agreement was designed to be executed by one bargaining representative for all "pilots", including engineers. The March 15 crew complement agreement is the same as that initialed on December 1, 1962; (255) it contains the name of Alpa in all appropriate places; it was designed to be executed by Alpa, by the Chapter, and by the Company. With the positions of the parties as they were on March 15, it was of course impossible to carry out the scheme contemplated by the March 15 agreements because Alpa had already commenced this action and could not consistently execute the agreements.

Copies of the March 15 agreements arrived at with the pilots were, at their request, provided to them by the Company; likewise the Company on occasions furnished rooms for negotiating sessions, secretarial help, coffee, etc. In volume this appears to have been *de minimis* and in any event it did not differ from what had been the practice in all past negotiations.

After Alpa and the American pilots had split apart, O'Connell (Master Chairman of American MEC and ex-officio a member of the Negotiating Committee) discussed with Lamond (Vice-president of American for flight) whether the pilot members of the committee could later be reimbursed by the Company for flight pay lost during the negotiations. This came about because such lost flight pay had in the past been paid to the pilots by Alpa itself, but this was no longer to (256) be expected and on January 24, 1963 Ruby notified the American pilots that no further payments would be made. When the subject was raised by O'Connell, the most Lamond would promise was to "consider" it in the future if it were "legal" under the Act. There was no promise of any such payment; there is no evidence that any such payments have been made; and

there is nothing in the incident which could possibly amount to unlawful assistance.

17. Formation of Allied Pilots Association; its Application to NMB

On March 19 through 22, the American MEC met in New York. The March 15 agreements were unanimously ratified. Ruby was invited to some of the sessions; he did attend and spoke to the group. Among other things, Ruby said that Alpa would not recognize any agreement negotiated by the pilots' committee and that he, as Alpa President, would not sign any such agreement if it did not contain a requirement of a "C and I" for flight engineers.

Anticipating that President Ruby would not sign the March 15 agreements, the MEC authorized the formation of a new organization—Allied Pilots Association—to take over representation of American Pilots. O'Connell was named temporary president, other temporary officers were named and (257) the members of the MEC (that is, the elected captain and co-pilot representatives of each Local Council on American) became the acting directors of the new organization.

There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave Alpa over the "C and I" issue and form their own organization.

Under date of March 28, Whitacre wrote to O'Connell confirming certain understandings as to the rates of pay and retirement benefits for engineers and adding that as to retroactive pay for engineers the Company "stands ready to meet with the Joint Committee"; apparently neither this letter nor the March 15 agreements were given to any of the engineer representatives.

The American MEC at its March 19-22 meetings had instructed O'Connell to make one last effort to have the March 15 agreements executed by President Ruby for Alpa.

O'Connell obtained from the Company copies of the March 15 agreements with the name of Alpa in all appropriate places and on the morning of March 29 asked President Ruby to execute them. Ruby asked that the agreements be left with him (258) for study; O'Connell refused; Ruby did not sign.

On April 12, Allied sent out to all American pilots cards which if executed would authorize Allied to be the collective bargaining representative under the Act of the pilot so executing and on his behalf to ask for certification under Section 2 Ninth of the Act (45 U. S. C. A. §152 Ninth).

On April 24, Allied filed with NMB an application, stating that a "representation dispute" had arisen among American pilots as to their representative under the Act and asking for an investigation and certification under Section 2, Ninth, of the Act. The "craft or class of employees involved" was said by Allied to be "pilots and co-pilots"; the total number of these was said to be 1600; and the total authorization cards submitted by Allied was said to be 1150.

At this point, the taking of evidence on these motions had been going on for some time, and at the opening of Court on April 25 an affidavit of O'Connell was submitted, setting forth the developments as to Allied and its application to NMB. Counsel for the additional defendants moved, or strongly suggested, that the motions of plaintiffs and (259) intervenors were moot, but their counsel opposed. Argument on this point was heard, the proceedings temporarily adjourned, and the following day a memorandum decision was filed directing that the hearings resume on April 30 and proceed to completion.

On April 26, O'Connell and all other members of the American Negotiating Committee (except Miller, who had resigned February 18, 1963) were expelled from Alpa. The grounds for expulsion do not appear in this record but since there were pleas of guilty by the American pilots, it may be surmised that expulsion was for "failing to comply

with a decision of . . . the Executive Board, the Executive Committee . . .", etc.

18. Recognition of Allied by the Company; Second Suggestion of Mootness

The hearings did resume on April 30 and were completed and the record closed on May 3; final briefs were received on May 27.

Apparently Alpa requested NMB to defer passing on the certification application of Allied until decision of the pending motions in this action. On May 24, NMB denied this request.

(260) On June 12, the NMB mediator reported that 1571 pilots and co-pilots of American were eligible to vote for a collective bargaining representative and that Allied had been given authorization by 1334 of these, or in excess of 84%.

NMB then ordered an election to be held among American pilots and co-pilots to decide whether Alpa or Allied would represent the pilots. No such election has taken place, however, because of an action commenced by Alpa against NMB in the District of Columbia and because of orders made by the Court therein.

On June 19 and July 3, Allied demanded of the Company recognition as collective bargaining representative of all American pilots and co-pilots.

On July 9, the Company recognized Allied as such representative and on the same day signed certain collective bargaining agreements with Allied, effective July 9, 1963.

On July 11, an affidavit of Whitacre was filed in this action, setting forth the most recent developments above mentioned and supporting a suggestion, filed on the same day by counsel for the Company, that the motions are now moot.

(261) The suggestion of mootness by the Company as to the pending motions is based on (1) the recognition by

the Company on July 9, 1963 of Allied as collective bargaining representative of the pilots, (2) the execution of collective bargaining agreements between Allied and the Company covering pilots and (3) the sending of a letter by the Company on July 11, 1963 to President Manning stating that the Company is "now prepared to resume bargaining" with the Chapter.

Copies of the July 9 agreements have been submitted by the Company. They differ significantly from the March 15 agreements because they do not cover, or purport to cover, or to affect in any way, the flight engineers; the December 1, 1962 crew complement agreement has not been executed.

3.

It must first be determined whether, as urged by defendant and additional defendants, the present motions are now moot. Plaintiffs and intervenors insist that they are not.

As to the issues raised by Alpa, the Company says that any status which Alpa may have had at one time is now lost through the July 9 recognition of Allied; that Allied is not a party to this action; and that the execution of the new agree- (262) ments is outside the scope of this action.

These may be arguments against the issuance of an injunction but they certainly do not show that all controversy has been eliminated and the motions become moot. The arguments do not really raise any issue of law as to mootness, because they do not meet the charges and grievances asserted by plaintiffs.

The organization of Allied, its recognition by the Company, and the execution of a collective bargaining agreement between Allied and the Company are not acts separate and independent from those on which plaintiffs base their claims. On the contrary, they follow from and are intimately related to the facts developed on these motions.

What Alpa argues is that there were violations of the Act and that the effects of these violations are continuing.

Indeed, the Alpa argument is that new facts on which the Company relies are themselves the result of the alleged illegal acts and that this Court has a duty under the Act to see that defendant does not enjoy these benefits of the alleged unlawful acts.

In the face of such arguments, it seems entirely clear (263) that the motions of Alpa are not moot and must be decided on their merits.

But even if the matter were regarded as doubtful, it would seem the better course to decide the issues tendered by plaintiffs rather than to declare them moot. On any appeal, the matter would then be fully before a higher court rather than in fragments.

The intervenor flight engineers are in a different factual situation from Alpa. As to the engineers, the Company now declares (under date of July 11, 1963) that "[b]ecause of these developments" (namely, the execution of agreements with Allied, etc.), it is "now prepared to resume bargaining with AAL Chapter, FEIA." The Company further declares that, at its request, Allied "has given us assurances for the protection of flight engineers".

The Company says that the intervenors sought a Court order directing it to bargain with the Chapter; that it is ready to do so and has declared its readiness to the Chapter in writing; and that accordingly no Court order is needed and the motions of intervenors are moot.

(264) The problem frequently arises whether an injunction should issue where the acts complained of have been discontinued during the litigation. See Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125, 137-146 (1946).

It is well settled that "the Court's power to grant injunctive relief survives discontinuance of the illegal conduct". *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). As explained by the Supreme Court in the *Grant* case, this is because

> "A controversy may remain to be settled in such circumstances. . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement."

The burden on a defendant asserting mootness by discontinuance of illegal acts is "a heavy one" (345 U. S. at 633). And in the *Grant* case, where refusal of an injunction was upheld as an exercise of discretion, the Supreme Court nevertheless concluded that "the actions were not moot" (345 U. S. at 635).

In the case at bar, the circumstances strongly suggest that the motions of intervenors should be decided on (265) their merits. If it be assumed—as it must be for present purposes—that the engineers have established violations of the Act, then it would seem that they ought to receive a protective injunction even though the Company's attitude may have changed. No bad faith on the part of the Company need be even suggested in this connection. Its present attitude is accepted as genuine and sincere. But that attitude can change; and of course the individuals determining the Company's attitude themselves change as retirements, promotions and replacements occur. Moreover, there is no admission or recognition by the Company that its attitude toward the engineers has been wrongful. This is a factor also to be considered. *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 448 (2d Cir. 1945). The Company's changed attitude is not the result of a recognition of its duties as claimed by the engineers; rather the change is based on the recognition of Allied and its "assurances" respecting the

engineers. If it be assumed that the engineers' claims on these motions are well founded, they should not be required to rely solely on "assurances" by Allied and on the dependent changed attitude of the Company.

And if the matter be doubtful, the same considerations as to a possible appeal are here present, as in the case of Alpa.

(266) The suggestion that the motions are moot is therefore rejected.

II

Once the facts have been analyzed and considered chronologically, the disposition of Alpa's motions is not difficult.

These motions ask in substance that a preliminary injunction issue directing the Company to bargain with Alpa as the "true representative" (300 U. S. at 548) of its pilot employees and restraining any bargaining as to pilots with any other group.

Whatever may have been the situation when the motions were made, since April 24, 1963, a proceeding has been pending before NMB to determine whether Alpa or Allied is the "true representative" of the pilots and NMB has ordered an election, on the basis of which NMB will certify the "true representative".

But whether NMB proceedings are pending or not, this Court is without power to find that Alpa is the "true representative" and entitled to the relief sought. The "administrative remedy" before NMB is "exclusive". *General Committee* v. *M-K-T Ry. Co.*, 320 U. S. 323, 336 (1943). (267) This principle has been recently recognized and followed in this Circuit where the dispute was over the "true representative" of flight engineers on an air line. *Flight Engineers Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (1963).

In the two cases cited, no proceedings to determine the "true representative" were in fact pending before NMB

but it was held that Congress had "excluded" the Courts from this "field" (311 F. 2d at 748).

In an interesting recent case having some parallel aspects, a railroad bargained with the national parent union and made an agreement. One of the local unions (part of the national organization) challenged the agreement as violative of the Act, asserting that the local was the "true representative" rather than the parent national union. The Courts were held to be without jurisdiction of the matter. *Division No. 14, Order of Railroad Tel.* v. *Leighty,* 298 F. 2d 17 (4th Cir. 1962). It was said that such disputes ought to be resolved within the union but that "if these intra-organizational efforts are challenged, Board action [i.e., NMB], not judicial intervention is indicated" (298 F. 2d at 21).

The argument for Alpa is that there are issues here beyond the identity of the representative; that there has been (268) influence and coercion by the Company in the choice by pilots of their representative, in violation of the Act, specifically Section 2, Third and Fourth (45 U. S. C. A. §152, Third and Fourth); that the Company assisted in the formation of Allied, in violation of Section 2, Fourth of the Act (45 U. S. C. A. §152, Fourth); that the effects of these violations continue; and that the Company should be prevented by this Court from securing any benefit from the alleged violations. The logical consequence of such an argument is that the Court should disqualify Allied as a possible representative, even though it might have the support of a majority of the pilots. The Court, according to Alpa, has such jurisdiction "independent of the National Mediation Board".

Apparently Alpa would agree that NMB has exclusive jurisdiction where the issue is simply to decide which of two rivals has majority support. But where violations of the Act—influence, coercion, assistance—are alleged, Alpa argues that this Court has an independent jurisdiction. At least under the conditions here present, I cannot agree.

The existence and effect of unlawful influence, coercion and assistance seem inseparable from all other matters to be determined by NMB under Section 2, Ninth of the Act. After all, (269) what Alpa is saying in effect is that because of influence, coercion and assistance by the Company, Allied (even though it might have majority support) cannot replace Alpa as the "true representative". This is the very question which Congress has committed to NMB, and not to the Courts.

Counsel for Alpa concede that where NMB acts under Section 2, Ninth, in a representation dispute, it deals with charges of unlawful interference, coercion and assistance. There is authority that the jurisdiction of NMB in these particular matters is exclusive. *WES Chapter, Flight Eng. Int. Assn.* v. *National Mediation Bd.*, 314 F. 2d 234 (D. C. Cir. 1962). An election was held by NMB to determine whether WES Chapter or SOA was the "true representative" of flight engineers; NMB certified SOA. An action was then commenced by WES Chapter to vacate the election and for injunctive relief. It was claimed (a) that eligible engineers had been excluded from voting and (b) that NMB had not investigated fully "the charge that SOA was dominated and assisted by the employer" (314 F. 2d at 235). It was held that the Courts could not assume jurisdiction of such questions; as to domination and assistance it was said (314 F. 2d at 237):

> "The Association charged that SOA was assisted and dominated by the employer in violation of Section 2, Third (270) and Fourth, of the Act. The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association. The statute, in Section 2, Ninth, requires an 'investigation' of such disputes; and the Board, it seems to us, did investigate. In a different case, where, for example, a

stronger showing is made initially by the charging party than was made here, the Board might be required to make a more independent investigation into a charge of company assistance to an opposing union seeking certification. But in discharging its duty to investigate in the manner it did in this case we find no official conduct in excess of authority and no refusal to bring the processes of the Board to bear in a reasonable manner on the dispute. Accordingly we do not think the District Court acquired jurisdiction to upset the Board's ruling that the Association's charges were without merit."

See also *Order of Ry. Conductors* v. *National Mediation Board,* 141 F. 2d 366 (D. C. Cir. 1944).

The findings of fact already made would preclude granting the motions of Alpa in any event. There is no showing of influence or coercion on the part of the Company nor any unlawful assistance by the Company in the break away from Alpa and in the organization of Allied.

The Company had nothing to do with the creation of the dispute within Alpa, nor is there any evidence of any preference by the Company not to have Alpa. The single remark attributed to Whitacre in February 1963 does not affect this conclusion; it was insignificant in character and was not (271) addressed to any pilots who might be affected thereby, but to flight engineers.

The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in good faith, reasonably, without any practical alternative, and without any anti-union motivation.

Nothing in the two cases on which Alpa chiefly relies is to the contrary.

In *Virginian Ry.* v. *Federation,* 300 U. S. 515 (1937) there was no question about who was the "true representative" of the employees. There had been an election

and a certification by NMB (there has never been any certification of Alpa). The question was whether there was a "legally enforcible obligation" (300 U. S. at 541) under the Act to bargain with the "true representative"; the petitioner railroad also argued the unconstitutionality of the Act.

In *Medo Corp.* v. *Labor Board,* 321 U. S. 678 (1944) the jurisdiction of the Court was not in doubt; the proceeding was on petition of the National Labor Relations Board to enforce its order requiring Medo to bargain with the union, etc. (29 U. S. C. A. (272) §160(e)). Moreover, the employer had induced the employees to leave the union by giving them a wage increase; here American displayed no interest in whether its employees left Alpa or not, certainly made no promises conditioned on their leaving Alpa or to induce them to leave Alpa, and at all times was willing to make agreements with Alpa if its own employees so desired. Also in the *Medo* case, the employer ceased and refused to deal with the union and instead dealt *directly* with the employees; here American continued to deal at all times with the same *representatives* of the employees, namely, the Negotiating Committee and the American MEC which finally caused the organization of Allied.

For the reasons set forth, the motions of Alpa must be denied.

III

The application of *Virginian Ry.* v. *Federation,* above, to the facts as found requires that the Chapter, representing American flight engineers, be given relief by way of a temporary injunction.

There is no doubt whatever that the Chapter is now, and at all relevant times has been, the "true representative" under the Act of the "craft or class" of flight engineer (273) employees of American. It was so certified by NMB on May 25, 1955. There has since that time

never been the slightest evidence from which the Company could conclude that the Chapter no longer represented such employees. No one else now claims, or has ever claimed, to represent the flight engineers.

From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers.

The situation seems to be exactly the same as in the *Virginian Ry.* case and in many later cases where the "command" of Congress expressed in the Act must "be enforced by the Courts" (300 U. S. at 543). The arguments by defendant and the additional defendants that the Norris-La Guardia Act (29 U. S. A. §101 and following) is applicable and prevents an injunction are without merit. They were rejected in the *Virginian Ry.* case where the Supreme Court declared that the provisions of the Railway Labor Act authorizing relief by injunction "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act" (300 U. S. (274) at 543). See also *Brotherhood of Railroad Trainmen* v. *Chicago River and I. H. Co.*, 353 U. S. 30 (1957); *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960).

Whether mentioned specifically herein or not, the Court has given careful consideration to all arguments of the Company in opposition to the motions of intervenors.

The principal contention of defendant is that the Chapter is "estopped" because of its participation in joint negotiations and because of statements said to have been made by counsel and by President Manning on November 1, 1962, that the flight engineers were merged with the pilots and that there was a single craft or class. The difficulty is that the facts do not support such contention. The representations as claimed were never made by the engineers

and, if they had been, the Company could not reasonably have relied on them; indeed, the Company did not rely on them. The situation was perfectly clear. From November 1, 1962 the parties were hopefully negotiating for a complete agreement which *if reached* would include merger of pilots and engineers on American into a single craft or class; as Whitacre testified, the negotiations were "subject to a complete agreement". Plainly, until that "complete agreement" was reached, there was no merger of pilots (275) and engineers and no single craft or class.

The Company also urges that it made "substantial concessions" because of the conduct of the engineers and that the engineers have not lived up to "prior commitments". But these contentions do not square with the facts. The engineers have received no "concessions", substantial or otherwise. The Company—like the other parties—is bound to nothing which it promised or settled or discussed in the negotiations, this because everything was "subject to a complete agreement". The so-called "prior commitments" of the engineers are subject to the same infirmity; they were all "subject to a complete agreement" which never came about.

The Norris-LaGuardia Act has already been found to be inapplicable here. It should be noted, however, that the intervenors in any event and on this record are shown to have complied with "every obligation imposed by law" and to have made "every reasonable effort" to settle the dispute. If their efforts were frustrated, the Company has at least some responsibility because it failed to deal with the Chapter as the "true representative" of the flight engineers.

The intervenors are by their present motions in form asking for a preliminary injunction, as opposed to a final (276) injunction after trial. But in fact there have been extensive hearings, the taking of much testimony and the reception of other evidence; it is difficult to see how a trial of the action would yield any significant further information. Under the circumstances, irreparable injury to

intervenors may result unless a preliminary injunction issues at this time. The contract under which the flight engineers were employed from May 1, 1958, expired on April 30, 1963. A new contract must be negotiated. The damage to intervenors if a preliminary injunction were denied outweighs any foreseeable harm to defendant or to the additional defendants; indeed defendant stated in its July 11, 1963 letter that it was prepared to bargain with the Chapter.

The motions of intervenors are accordingly granted.

IV

American has moved for an order under Fed. R. Civ. P. 53 referring to a master the question whether its "flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative". It is said that this determination is "relevant" to the Company's "defense". Whatever the merits or demerits of the motion may once have been, the passage of time and the disposition (277) of the other motions have eliminated any necessity for such relief to the Company. The motion is accordingly denied.

The foregoing opinion sets forth the findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

Settle orders separately as to (a) the two motions of plaintiffs, (b) the two motions of intervenors, and (c) the motion of defendant. Suggestions are invited from counsel as to the amount of security to be required of intervenors under Fed. R. Civ. P. 65(c). Settlement of the orders should be noticed for noon on Friday, August 16, 1963 or at any earlier time by which counsel for all parties will have completed submission of their papers.

Dated: New York, New York
August 12, 1963

INZER B. WYATT,
United States District Judge

Opinion of the District Court.

Summary Judgment.

(279) WYATT, District Judge.

This action was commenced on March 1, 1963 and is at issue on pleadings which have been completed, including an amended complaint of plaintiffs, filed April 12, 1963.

Motions by plaintiffs and by intervenors for preliminary injunctions, and by defendant for a reference (280) to a master, have been determined by an opinion (with findings of fact and conclusions of law) filed earlier on this day.

The motions now before the Court are (1) a motion by plaintiffs for summary judgment in their favor under Fed. R. Civ. P. 56 (reserving the amount of damages for determination at a hearing) and (2) a motion by defendant to strike an affidavit of Charles H. Ruby, sworn to June 8, 1963, and Appendix A thereto on the ground that said affidavit and appendix (submitted in support of the motion by plaintiffs for summary judgment) violate Fed. R. Civ. P. 56(e) and General Rule 9(g) of this Court.

The additional defendants not only oppose the motion for summary judgment in favor of plaintiffs but, without formal cross-motion, request that summary judgment be entered in favor of the additional defendants.

The opinon, findings of fact, and conclusions of law earlier filed herein by the Court determine that there is no genuine issue as to any material fact, that the issues tendered by plaintiffs in their complaint are cognizable only by NMB because "the administrative remedy is exclusive" (320 U. S. at 336), and that in any event the plaintiffs have no case on the merits.

Where a motion for summary judgment has been made (281) under Fed. R. Civ. P. 56, the District Court has authority to enter a summary judgment against the moving party even though there has been no cross-motion for summary judgment. *Local 33, Int. Hod Carriers, etc.* v. *Mason Tenders, etc.*, 291 F. 2d 496, 505 (2d Cir. 1961). The follow-

ing reasoning by Judge Medina in the cited case seems peculiarly applicable to the situation in the case at bar (291 F. 2d at 505):

> "Especially where there are several motions by the respective parties and the evidence of the facts bearing on the issues arising out of the complaint is all before the court in affidavit form, it is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had defendant made a cross-motion for summary judgment."

Although the Court would grant summary judgment dismissing the amended complaint of plaintiffs on the merits, under *General Committee* v. *M-K-T Ry. Co.*, 320 U. S. 323 (1943) the proper disposition appears to be a dismissal for lack of jurisdiction over the subject matter. Accordingly, a summary judgment in favor of defendant and of the additional defendants against plaintiffs is granted and the Clerk is directed to enter judgment hereon dismissing the amended complaint of plaintiffs for lack of jurisdiction over the subject matter. (282) As to the intervenors, their claims are directed to be severed and proceeded with separately. Fed. R. Civ. P. 21.

The motion by defendant to strike the affidavit of Charles H. Ruby, and appendix thereto, is denied.

So ordered.

Dated: New York, New York
August 12, 1963

Inzer B. Wyatt
United States District Judge

Exhibit (1).

April 24, 1963

Mr. A. DiPasquale
Asst. Vice President-Labor Relations
American Airlines, Inc.
633 Third Avenue
New York 17, New York

Mr. Charles H. Ruby, President
Air Line Pilots Association, Intl.
55th Street & Cicero Avenue
Chicago 38, Illinois

Gentlemen:

We have an application from the Allied Pilots' Association to investigate a representation dispute under the provisions of Section 2, Ninth, of the Railway Labor Act among the following employees of the American Airlines, Inc.:

Pilots and Copilots

Mr. DiPasquale is requested to furnish the total number of employees covered by this application and he is also invited to submit any other statement he may care to make.

Our records indicate that the employees are presently represented by the Air Line Pilots Association, International and Mr. Ruby is invited to submit any statement he may care to make with respect to this application.

Very truly yours,

E. C. Thompson
Executive Secretary

CC-to: Mr. Nicholas J. O'Connell, Jr.
Acting President
Allied Pilots' Association
645 Paseo De La Playa—Apt. 302
Redondo Beach, California

Mr. Nicholas J. O'Connell, Jr.
c/o Martin C. Seham, Attorney at Law
205 West 34th Street
5-sad New York 1, New York

Exhibit (2).

NATIONAL MEDIATION BOARD

4:25 p.m.
5-8-63

W. B. WHITACRE—Vice President—Personnel
American Airlines
633 Third Avenue
New York 17, New York

CHARLES H. RUBY, Pres.
Air Line Pilots Assn., Int'l.
55th Street and Cicero Ave.
Chicago 38, Illinois

Mr. HENRY WEISS
Cohen and Weiss
50 East 42nd Street
New York 17, New York

NICHOLAS J. O'CONNELL, JR.
Acting Pres.
Allied Pilots' Association
645 Paseo De La Playa—Apt. 302
Redondo Beach, California

MARTIN C. SEHAM, Esq.
205 West 34th St.
New York 1, New York

A. ALFRED DELLA CORTE
Bristol Hotel
New York, New York

Application of Allied Pilots Association for investigation of representation dispute among pilots and copilots of American Airlines, Inc. has been assigned our File C-3351. Mediator A. Alfred Della Corte will be at Bristol Hotel New York City on Friday, May 10, 1963 to commence

Exhibit (4).

preliminary investigation. Please acknowledge and advise who will represent you. Joint Whitacre, Ruby, Weiss, O'Connell, Seham, Della Corte.

E. C. THOMPSON
Executive Secretary
National Mediation Board

4/js

Exhibit (4).

[LETTERHEAD]

May 16, 1963
CASE No. C-3351

NATIONAL MEDIATION BOARD
1230 Sixteenth Street, N. W.
Washington 25, D. C.

Dear Sirs:

On May 10 Mr. Della Corte requested that we submit a statement of our position in this proceeding. This has been done in the Petition for Leave to Intervene which we are today filing with the Board, copy of which is enclosed.

I have two additional comments on statements made to the Board by others:

1. The telegram of Mr. Henry Weiss, General Counsel, Air Line Pilots Association, dated May 6, 1963, states that ALPA has brought an action in the U. S. District Court in which ALPA has alleged that American Airlines and certain named pilots "independently and in concert with each other have been involved in assistance, influence and coercion of the affected employees in violation of the provisions of the Railway Labor Act . . ."

This allegation is irresponsible and patently untrue. As your records will show, the negotiations by American and

such pilots have been conducted at all times under the auspices of the Chairman of the National Mediation Board.

The facts completely refute any improper conduct. The settlement agreed to between American and its flight crews is based on a proposal *made by the pilots* when they were members in good standing of ALPA and during the course of negotiations presided over by ALPA. The falling out within the pilot group ocurred when ALPA, months after this proposal had been made by its own representatives, decided it would no longer support the proposal. Thus, ALPA, by its own actions, has created the breach that resulted and has driven over 90 percent of the pilots of American to indicate in writing their preference for another organization. ALPA's view that these pilots must have been improperly influenced because they disagree with ALPA, assumes that they are so lacking in intelligence or inexperienced with respect to collective bargaining as to be incapable of deciding what is in their own best interests.

2. The letter from Mr. Asher Schwartz, counsel for American Airlines Chapter, Flight Engineers' International Association, dated May 8, 1963, states with reference to the litigation referred to in 1 above, that "one of the substantial issues which the U. S. District Court is now considering, and upon which the Court will issue its decision" is whether "the flight engineers have become part of the craft and class of pilots, in accordance with the Board's decision in Case No. C-2946."

On May 10, two days after writing the above letter, Mr. Schwartz took the contrary position before the same Court in the Dues Check-off Case, Civil Action No. 63-1187, as shown in the following colloquy:

> "The Court: I am confident of that, to determine craft or class is not a job for the Court.
>
> "Mr. Wisehart: That is certainly our position, your Honor. Perhaps Mr. Schwartz sees it differently.

Exhibit (4).

"Mr. Schwartz: No, sir, I do not see it differently" (Tr. 14).

It is apparent, contrary to Mr. Schwartz's assertion in his letter to you, that neither the Court nor Mr. Schwartz expects a judicial decision on the class or craft issue.

Thank you for this opportunity to present a statement.

Respectfully submitted,

W. B. WHITACRE,
W. B. WHITACRE,
Vice President—Personnel

Enclosure
4 Copies submitted

cc w/enc.: Asher W. Schwartz, Esq.
O'Donnell & Schwartz
501 Fifth Avenue
New York 17, New York

Martin C. Seham, Esq.
205 West 34th Street
New York 1, New York

Henry Weiss, Esq.
Cohen & Weiss
50 East 42nd Street
New York 17, New York

Exhibit (4).

BEFORE THE

NATIONAL MEDIATION BOARD

IN THE MATTER *of* Application of ALLIED PILOTS ASSOCIATION.	Case No. C-3351 **PETITION FOR LEAVE TO INTERVENE**

AMERICAN AIRLINES, INC. (hereinafter called "American") hereby petitions for leave to intervene as a party in the above entitled matter and in support of said petition makes the following statement.

I. INTRODUCTION

The application of the Allied Pilots Association is for the designation of that organization as bargaining representative of the pilots and copilots employed by American. American has additional reasons for intervening in this proceeding:

A. American has an interest in the craft or class of its employees determined by the National Mediation Board to be appropriate for bargaining representation.

B. American has negotiated a settlement of the crew complement dispute as well as a basic working agreement with representatives of its employees which may be affected by this proceeding.

C. American has an interest in defending itself against charges of improper interference, coercion, or influence made by the Air Line Pilots Association (hereinafter called "ALPA") in this proceeding.

Exhibit (4).

D. This proceeding has raised facts involved in pending litigation to which American is an essential party.

The interest of American would not be adequately represented by any of the present parties herein.

II. The Appropriate Craft or Class

1. The application of the Allied Pilots Association covers only pilots and copilots.

However, the only recent determination on this subject, C-2946 decided in 1961 relating to United Air Lines, holds that flight engineers should be included with pilots and copilots in the single craft or class of flight deck crew members (3 NMB Craft or Class Determinations 56).

2. In the early part of August 1962, American's pilot representatives proposed a crew complement solution based on single representation of flight deck crew members, with flight engineers to be covered in the pilots' basic working agreement. The solution included conversion from four to three-man cockpit crews on jet aircraft accompanied by a reduction in hours and improved working conditions. The pilot representatives undertook the responsibility of bringing in the flight engineers.

After a period of time in which alternative possibilities were discussed, American accepted the pilots' proposal.

3. Pilots and flight engineers negotiated on a merger agreement in October 1962. American did not participate in these negotiations.

On November 1, 1962, the pilots and flight engineers met jointly with American's representatives. At that meeting the flight engineers' representatives announced: (a) that negotiations on the merger agreement were substantially complete and it therefore was possible to proceed to negotiate a crew complement settlement without concern that the

merger agreement would cause an impediment in the future; (b) that "We're all pilots now"; and (c) that Mr. N. J. O'Connell, Jr., spokesman for the pilots' group, was spokesman for the flight engineers as well.

Present at that meeting were the Chairman of the National Mediation Board and Mediator Michael O'Connell.

4. American thereupon recognized the joint committee as representing both pilots and flight engineers, and negotiated with them on that basis for a period of approximately four months thereafter. In the course of such negotiations, American made substantial concessions benefiting both pilots and flight engineers in reliance on the continuing fact of single representation. Had single representation not been an accomplished fact, such concessions would not have been made.

(Benefits accorded flight engineers are set forth more fully in Mr. Whitacre's letter of March 28, 1963 to Mr. E. C. Thompson, which is incorporated as if fully set forth herein.)

5. During the month of November 1962, the parties jointly negotiated a crew complement agreement. This agreement is embodied in a document which was initialed on December 1, 1962 by representatives of the pilots, the flight engineers, and American, and delivered on that date to Mediator O'Connell for "redding out".

In the crew complement document so initialed by all the parties, flight engineers are called "pilots" and placed on the Pilots System Seniority List. The crew complement document also provides that flight engineers "shall be consolidated into one unit with other Pilots employed by the Company for the purpose of collective bargaining representation," and recites that "a majority" of the flight engineers having chosen the then collective bargaining representative of the pilots, the "AAL Chapter,

Exhibit (4).

Flight Engineers International Association hereby irrevocably relinquishes any right it may have to represent employees of the Company". The document contains special protection for the flight engineers in connection with the conversion from four to three crew members and makes a tri-partite grievance procedure available to them. It provides that the flight engineers ". . . shall be covered by the Pilots' basic agreement."

6. After completion of the crew complement document, the parties resumed negotiations on the pilots' basic agreement covering flight engineers as well as pilots. Contractual provisions settled thereafter were initialed only by American's representative and the chairman of the joint committee of pilots and flight engineers, on the assumption that single representation of the pilots and flight engineers was an accomplished fact. The flight engineers did not object to this procedure, although they were present and knew that it was being followed.

The flight engineers continued to attend the joint negotiating sessions until the end of February 1963, even though they learned of ALPA's objection at least as early as December 1962. Although the flight engineers no longer attended the meetings after the latter part of February, the pilot representatives remaining bargained as a joint committee, on behalf of and as representatives of flight engineers as well as pilots, and American recognized and treated with them in such capacity in the presence of the Chairman of the National Mediation Board. At the time when the basic agreement was settled, on March 15, 1963, the flight engineers had never repudiated the commitments which had been made concerning them by the joint committee.

III. The Settlement

1. The March 15, 1963 settlement mentioned above covers both pilots and flight engineers in one basic agree-

ment. Related agreements including the December 1 crew complement agreement also are part of the documentation comprising the settlement. All of the documents have been "redded out" as well as initialed and are in the custody of the Chairman of the National Mediation Board.

The settlement would result in a complete solution to the long-standing crew complement controversy between pilots and flight engineers and would provide for single representation.

2. The Allied Pilots Association was organized after the March 15 settlement. The pilots responsible for organizing the Association, however, were the ones who had negotiated the settlement. An identity of interest therefore exists and commitments and understandings of prior bargaining representatives are binding on their successors under the Railway Labor Act. It is the position of American that the March 15 settlement is binding on the Allied Pilots Association if it should be designated bargaining representative.

IV. The Charge of Coercion.

1. The negotiations leading to the March 15 settlement were initiated in July 1962 at the request of the Secretary of Labor for the purpose of resolving the crew complement controversy.

2. After the December 1 crew complement agreement was initialed, American learned that ALPA objected to certain of its terms. The president of ALPA asked that negotiations stop, but the AAL-MEC, the highest unit of ALPA with respect to American's pilots, unanimously passed a resolution on January 9 instructing its Negotiating Committee to continue negotiations. As to the flight engineers, the resolution contained the following recitation:

> "... the AAL Flight Engineers have indicated their unanimous desire to conclude and implement a crew

complement solution, a merger with the AAL pilots, which would result in one union in the cockpit, and a single contract covering all flight deck operating crew members on AAL. . . ."

3. American thereupon inquired as to the view of the Chairman of the National Mediation Board, who had participated in the past negotiations. He advised that, inasmuch as the parties were the same as those who had commenced to negotiate in July at the request of the Secretary of Labor, the negotiations should continue. American agreed to do so in reliance on this advice, the representations of the pilots, and the continuing participation of the flight engineers.

4. ALPA continued to object strenuously. Again an inquiry was addressed to the Chairman of the National Mediation Board and his reply, as reflected in negotiation notes of January 21, 1963, was in substance as follows:

"These are the best negotiations I've ever seen. Technically we are not in mediation—rather I have been commissioned by the Secretary of Labor to lend my services. If I thought there was anything illegal about these proceedings, I wouldn't be here."

5. The pilots with whom American resumed negotiations were the ones with whom negotiations had started and they constituted the official negotiators for American's pilots within the ALPA organization.

V. The Pending Litigation

American is a party in the litigation previously referred to in the United States District Court for the Southern District of New York. Because of a similarity of factual issues, these proceedings before the National Mediation Board may affect the disposition of such litigation or, conversely, such litigation may have a bearing upon these proceedings.

Exhibit (4).

VI. Conclusion

In support of this petition for leave to intervene, American also relies on Section 6(a) of the Administrative Procedure Act (5 U. S. C. A. §1005(a)) and Sections 2, 5, 6, and 203 of the Railway Labor Act (45 U. S. C. A. §§152, 155, 156, and 183), under which it hereby invokes the services of the National Mediation Board in connection with this dispute.

Wherefore, American's petition to intervene should be granted together with such other and further relief as may be just and proper.

Respectfully submitted,

Arthur M. Wisehart
Arthur M. Wisehart
Attorney for American Airlines, Inc.
633 Third Avenue
New York 17, New York
TN 7-1234

May 16, 1963

George A. Spater
H. Wayne Wile
Of Counsel

Exhibit (4).

VERIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM B. WHITACRE, being duly sworn, deposes and says:

1. I am Vice President—Personnel of American Airlines, Inc.

2. I have read the statements of fact in the foregoing Petition for Leave to Intervene, and they are true.

3. I make this verification in my capacity as an officer of American Airlines, Inc., a corporation organized under the laws of the State of Delaware.

WILLIAM B. WHITACRE
WILLIAM B. WHITACRE

Sworn to this 16th day }
of May, 1963. }

NANCY L. MCCLURE
Notary Public

NANCY L. MCCLURE
Notary Public, State of New York
No. 30-2605775
Qualified in Nassau County.
Cert. Filed in New York County
Commission Expires Mar. 30, 1965

Exhibit (5).

RDAO13 125P EDT MAY 21 63 RA272
R NAI29 LONG PD WUX NEW YORK NY 21 1232P EDT
E C THOMPSON, EXECUTIVE SECRETARY, NATIONAL MEDIATION BOARD 1230 SIXTEENTH ST NORTHWEST WASHDC

YR TEL 5-20-63 FILE C-3351 THE PETITION FOR LEAVE TO INTERVENE WAS FILED SO THAT THE BOARDS ACTION WITH RESPECT TO THE APPLICATION OF THE ALLIED PILO TS ASSOCIATION WILL NOT PREJUDICE AMERICAN POSITION CONCERNING ITS RELATIONS WITH PILOTS AND FLIGHT ENGINEERS OR THE RELATIONS BETWEEN PILOTS AND FLIGHT ENGINEERS HOWEVER THE COMPANY DOES NOT BELIEVE THAT DESIGNATION OF THE PILOTS REPRESEN- TATIVE SHOULD BE DEFERRED PENDING RESOLUTION OF THOSE MATTERS. IT BELIEVES THAT LABOR HARMONY AND STABILITY ON AMERICAN AIRLINES REQUIRE A PROMPT DETERMI- NATION OF THE PILOTS WISHES. THEREFORE WITHOUT PREJUDICE TO AMERICANS POSITION CONCERNING THE ABOVE RELATIONSHIPS AND IN THE INTEREST OF ORDERLY PROCEDURE, AMERICAN SUGGESTS THAT THE PILOTS REPRESENTATIVE BE PROMPTLY DESIGNATED, AND THAT THE OTHER MATTERS RAISED BY AMERICAN BE HELD IN ABEYANCE PENDING SUCH DETERMINATION. AT THAT TIME, AMERICAN WILL SPECIFY IN GREATER DETAIL THE NATURE OF THE GROUNDS ON WHICH IT SEEKS TO INVOKE THE BOARDS SERVICES.

W B WHITACRE AMERICAN AIRLINES
5-20-63 C-3351

Exhibit (I).

NATIONAL MEDIATION BOARD
Washington

May 24, 1963
Case No. R-3619

Mr. W. B. WHITACRE, Vice President—Personnel
American Airlines, Incorporated
633 Third Avenue
New York 17, New York

Mr. CHARLES H. RUBY, President
Air Line Pilots Association, Intl.
55th Street & Cicero Avenue
Chicago 38, Illinois

Mr. N. J. O'CONNELL, JR., Acting President
Allied Pilots' Association
645 Paseo de la Playa, At. 302
Redondo Beach, California

Gentlemen:

Reference is made to NMB File No. C-3351 which covers an application filed by the Allied Pilots' Association on April 24, 1963 for investigation of a representation dispute among Pilots and Copilots of American Airlines, Inc.

This application was given a preliminary investigation by Mediator A. Alfred Della Corte commencing May 9, 1963, and his report has been received and considered by the Board. The Board has also been furnished certain information by the carrier and the attorneys for the Air Line Pilots Association, International and the Allied Pilots' Association.

The Board has reviewed all the information now in its possession and is of the opinion no issues have been raised which warrant further preliminary proceedings. Accordingly, the request of ALPA that the processing of this

Exhibit (9).

application be de[illegible]red pending the outcome of current litigation is denied

The Board, in executive session on May 24, 1963, directed that the application filed by the Allied Pilots' Association on April 24, 1963 be docketed as NMB Case No. R-3619 and a mediator will be assigned for further handling in accordance with the Board's usual procedures.

By direction of the NATIONAL MEDIATION BOARD.

/s/ E. C. THOMPSON
E. C. THOMPSON
Executive Secretary

4-ctm
cc-to: H. Weiss
M. C. Seham

Exhibit (9).

RDA004 835A EDT JUN 13 63 NHC012 SPOD086 BB239
B UDB022 GOVT NL COLLECT UD NEW YORK NY 12
E C THOMPSON EXECUTIVE SECRETARY

NATIONAL MEDIATION BOARD WUX WASHDC
R3619. TOTAL ELIGIBLE FIFTEEN HUNDRED AND SEVENTY-ONE. CHECKED THIRTEEN HUNDRED AND THIRTY FOUR ACCEPTABLE AUTHORIZATION CARDS FOR INVOKING PARTY REPRESTING EIGHTY FOUR PLUS PERCENT. RECOMMEDND MAIL BALLOT ELECTION AND REQUEST AUTHORITY TO PROCEED ACCORDINGLY

ALSO FORWARD SIXTEEN HUNDRED SETS MAIL BALLOT ENVELOPES INCLUDING INSTRUCTIONS FOR VOTING BY MAIL TO ME CARE AMERICAN AIRLINES PERSONNEL OFFICE 633 3RD AVE NEW YORK CITY

AADELLACORTE.

Exhibit (L).

NATIONAL MEDIATION BOARD
Washington

June 5, 1963
Case No. R-3619

Mr. HENRY WEISS
COHEN AND WEISS
50 East 42nd Street
New York 17, New York

Dear Mr. Weiss:

This acknowledges, and is in response to, your letters of May 27th and 31st, 1963.

The Board, in executive session, has fully considered your letters, and treats and regards same as a request for reconsideration of its previous ruling with reference to Section 2, Ninth proceedings in NMB Case No. R-3619.

The decision made in the third paragraph of our letter of May 24, 1963, copy attached for ready reference, is clear and unambiguous.

Your letters of May 27th and 31st, 1963 provided no basis for a reversal of the previous holding. Accordingly, the Board finds no reason to alter its previous ruling and the statutory mandate to progress its investigation of the question of representation which has been raised.

As you were previously advised, the Board will proceed with the handling of Case R-3619 in accordance with the provisions of Section 2, Ninth of the Railway Labor Act.

By direction of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON
E. C. THOMPSON
Executive Secretary

4-ctm
cc-to: MR. WHITACRE
MR. O'CONNELL
MR. RUBY
MR. SEHAM
MR. WISEHART

United States District Court Defendant's Exhibit D.

Crew Complement Agreement, Initialed by All Parties, December 1, 1962.

Memorandum of Agreement.

The parties, AMERICAN AIRLINES, INC., hereinafter referred to as "THE COMPANY", and the AIR LINE PILOTS in the service of American Airlines, Inc., as represented by the AIR LINE PILOTS ASSOCIATION INTERNATIONAL and the FLIGHT ENGINEERS in the service of the Company as represented by the AAL CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, have reached the following agreements and understandings on the proper crew complement and qualifications for the safe, efficient and economical operation of the Company's aircraft,

NOW, THEREFORE, it is understood and agreed:

1. All cockpit stations on all aircraft shall be manned and operated by pilots in the employ of the Company on the American Airlines Pilots' System Seniority List.

2. All cockpit crew members hired subsequent to the date of this Memorandum of Agreement shall meet the Company's employment requirements for the hiring of pilots.

3. (a) "Pilots" as used in this Memorandum of Agreement shall mean those persons whose names appear on the Pilots' System Seniority List attached hereto as Appendix A* and cockpit crew members hired hereafter.

---

* Appendix A, the Pilots' System Seniority List, shall be divided into two parts—the Pilots' Seniority List and the Flight Officers' Seniority List—constructed as follows:

(a) The Pilots' Seniority List shall contain the names of all Pilots and Flight Engineers in the employ of the Company or on furlough as of July 1, 1962. The names of Pilots shall be first, listed in the same order as that in which they appear on the Pilots' System Seniority List of July 1, 1962 (attached). The names of Flight Engineers shall follow, listed in the same order as that in which they appear on the Flight Engineers' System Seniority List

(b) "Turbojet aircraft" as used in this Memorandum of Agreement shall mean turbojet aircraft required by government regulations to carry a minimum of three cockpit crew members.

(c) "Flight Officer" as used in this Memorandum of Agreement shall mean a Pilot serving as the third crew member on all aircraft operated with three or more cockpit crew members.

4. (a) The Company shall have the right to convert from four-man to three-man cockpit crews on turbojet aircraft. Such conversion may be made in accordance with the timetable specified in the Pilots' basic agreement.

(b) To the extent that the Company continues to operate turbojet aircraft with three Pilots and a Flight Engineer during the conversion process, the assignment of Second Officers on such aircraft shall be in accordance with the second officer Memorandum of Understanding dated January 21, 1959, but said Memorandum of Understanding shall not in any way restrict or limit the Company's right to operate turbojet aircraft with three cockpit crew members as provided herein. Said Memorandum of Understanding shall not be applicable to turbojet aircraft operated wth three-man cockpit crews and, upon completion of the conversion

---

of July 1, 1962 (attached) but above any pilot hired by the Company after July 1, 1962.

(b) The Flight Officers' Seniority List shall contain the names of all Pilots and Flight Engineers in the employ of the Company or on furlough as of July 1, 1962. The names of Flight Engineers shall be first listed in the same order as that in which they appear on the Flight Engineers' System Seniority List of July 1, 1962 (attached). The names of Pilots, other than Flight Engineers shall follow, listed in the same order as that in which they appear in the Pilots' System Seniority List of July 1, 1962 (attached), but above any Pilot hired by the Company after July 1, 1962.

(c) The Pilots' System Seniority List shall contain each Pilot's initial hiring date as a Flight Crew Member. An asterisk shall be placed beside the name of each person whose name appears on the attached Flight Engineer Seniority List.

to such crews, said Memorandum of Understanding shall expire and be of no further force and effect.

5. Pilots whose names appear with an asterisk on Appendix A hereof shall have a reasonable period of time in which to acquire needed Flight Officer qualifications under appropriate training to be provided by the Company on Company time, but the Company shall not at any time be required to provide pilot training for such pilots attributable to a change in the qualifications for third crew members by any governmental agency. If a change in qualifications by any governmental agency causes or threatens to cause such Pilots or any of them to lose employment as third crew members, the consequences of such change in qualifications to such Pilots shall be equitably resolved in accordance with the procedures set forth in Section 12 of this Memorandum of Agreement including reference to the neutral referee if necessary.

6. Subject to the terms of the Pilots' basic agreement, a Pilot whose name appears with an asterisk on Appendix A hereof shall be assigned to duties as a Flight Officer on three-man turbojet cockpit crews when such Pilot becomes qualified to perform emergency relief necessary to assist the pilot then in command in the event of the incapacitation in flight of either the Captain or First Officer, which qualification shall be satisfied by fulfilling the following requirements:

(a) Possession of a commercial pilot's license and instrument rating and have completed to the satisfaction of the Company the qualifications required herein, or possession of any type of pilot certificate as referred to in Part 61, Federal Aviation Regulation dated November 1, 1962 and have logged a minimum of 1500 hours of flight crew time in scheduled air transport operation and have completed to the

satisfaction of the Company the qualifications required herein.

(b) Possession of a current flight engineer certificate with qualification on one or more of the aircraft types operated by the Company.

(c) Possession of a current FCC Restricted Radio/Telephone Permit.

(d) Attend and complete a Flight Officer training course designed and given by the Company including the following subjects:

(i) Pilot navigational duties, including radio navigation.

(ii) The use of en route charts and navigational facilities as well as approach plates and terminal facilities.

(iii) Radio communications equipment, aircraft communications requirements and procedures.

(iv) A flight simulator demonstration of Flight Officer functions in providing emergency relief necessary to assist the Pilot then in command, in the event of the incapacitation in flight of either the Captain or First Officer, by executing such en route, approach and landing co-pilot duties, including checklist functions, as would be performed by the second in command at the direction of the pilot then in command in the emergency situation specified above, other than manipulation of the primary flight controls.

(v) Theory of flight, jet aircraft.

(vi) Aircraft equipment and limitations; operation of jet aircraft systems; and location and function of all controls; and checklist requirements.

Crew Complement Agreement, Initialed by All Parties, December 1, 1962.

(vii) Cockpit familiarization at all Pilot stations and Flight Officer functions and responsibilities during flight and landing emergencies.

(viii) Systems monitoring and fuel management computation.

(ix) Center of gravity computations.

(x) Wind and runway computations.

(xi) Meteorological maps and charts and temperature and winds aloft data.

(xii) A Pilot whose name appears with an asterisk on Appendix A hereof who has not been qualified for flight crew duties as a member of a four-man turbojet crew shall, before being assigned as a member of a three-man turbojet crew, complete in addition to the qualifications and training required herein, a minimum of 25 hours of in flight orientation, familiarization, duties, and functions of the Flight Officer on turbojet aircraft. This requirement may be reduced one hour for each landing and takeoff of the aircraft to a minimum of 12.5 hours.

7. In the event the qualifications for Flight Officers are changed by the Company, the Pilots whose names appear with an asterisk on Appendix A hereof shall, by virtue of fulfillment of the requirements set forth above, be deemed to have the basic qualifications for the position of Flight Officer in the cockpit crew on the Company's turbojet aircraft, but said Pilots shall accept such additional training relating to the proper performance of the Flight Officer function as the Company may require on Company time, at Company expense.

8. Pilots whose names appear with an asterisk on Appendix A hereof shall be, and are hereby, guaranteed

the following rights, so long as they remain in the employ of the Company as Flight Officers:

(a) The prior right, over all other Pilots, to the third crew member position on all aircraft operated by the Company which government regulations require to be operated with three or more cockpit crew members, and for which a flight crew member who possesses a flight engineer certificate is qualified.

(b) The right to accrue seniority on the Pilots' System Seniority List. The exercise of such seniority shall be as provided in the Pilots' basic agreement.

(c) Protection against being furloughed or continued on furlough so long as any individual below them on the Flight Officers' Seniority List is serving as a Flight Officer on any aircraft operated by the Company which government regulations require to be operated with three or more flight crew members, and for which a flight crew member who possesses a flight engineer certificate is qualified for the third crew member position.

(d) An individual agreement in the form attached as Appendix B to the original, executed copy hereof shall be given to each Pilot whose name appears with an asterisk on Appendix A hereof.

9. The terms of this Memorandum of Agreement shall be for the benefit of and binding upon the parties, their successors or assigns, the persons named in Appendix A hereof, and all persons hereafter added to the Pilots' System Seniority List.

10. No party to this Memorandum of Agreement shall seek in any manner to remove, from the Federal Aviation Regulations, the requirement that a flight engineer certificate be possessed by one cockpit flight crew member in

turbojet aircraft, nor add to the Federal Aviation Regulations any requirement of a certificate which will jeopardize the job security of any Pilot whose name appears with an asterisk on Appendix A hereof and who remains in the active employ of the Company as a Flight Officer or retains recall rights.

11. The Pilots whose names appear with an asterisk on Appendix A hereof shall be consolidated into one unit with the other Pilots employed by the Company for the purpose of collective bargaining representation, and a majority of the Pilots whose names appear with an asterisk on Appendix A hereof have chosen the Air Line Pilots Association International as their exclusive collective bargaining representative. The AAL Chapter, Flight Engineers International Association hereby irrevocably relinquishes any right it may have to represent employees of the Company, and acknowledges that the Company is entitled to treat the Air Line Pilots Association International as the exclusive collective bargaining representative of any and all of the Pilots whose names appear with an asterisk on Appendix A hereof. The Pilots whose names appear with an asterisk on Appendix A hereof shall be covered by the Pilots' basic agreement.

12. Any dispute, claim or grievance arising out of or relating to the interpretation or application of this Memorandum of Agreement shall be resolved pursuant to Section 204 of the Railway Labor Act as follows:

(a) Any party to or persons bound by this Memorandum of Agreement may serve a written notice of protest within thirty days after the date of becoming aware of the action protested.

(b) The written protest shall be served on the Chairman of the American Airlines MEC of the Air Line Pilots Association, International, the Company's

Assistant Vice President—Labor Relations, and the designated Flight Engineer representative chosen by the Flight Officers on the American Airlines MEC at the time. Unless the three of them settle the matter to the satisfaction of the petitioner within fifteen days after receipt of the protest, the matter may be appealed, with a full statement of the facts and supporting data bearing on the dispute, to the Special Board of Adjustment hereinafter created for such purpose if such appeal is made within thirty days after the date on which the notice of protest is originally served.

(c) The Special Board of Adjustment shall consist of three members: The Chairman of the American Airlines MEC of the Air Line Pilots Association International, the Vice President—Flight of the Company, and the designated Flight Engineer representative chosen by the Flight Officers on the American Airlines MEC at the time. Any of the foregoing may designate an alternate to serve in his stead on the Special Board of Adjustment. A unanimous decision by the Special Board of Adjustment shall be final and binding on all parties.

(d) If the Special Board of Adjustment fails to render a unanimous decision within twenty days after receipt of the appeal, or a vacancy exists on said Board, the petitioner may cause the matter to be referred to as neutral referee by serving a notice thereof on each of the Board members and the neutral referee within thirty days after the appeal was received by the Board. The other members of the Special Board of Adjustment shall provide the neutral referee with information and assistance as required by him, but they shall not vote on the decision of the neutral referee. The absence of one or more of

such Board members other than the neutral referee, from part or all of the proceedings, shall in no way affect the validity or enforceability of the decision of the neutral referee. The neutral referee shall issue his decision within sixty days after the appeal was referred to him.

(e) The decision of the Special Board of Adjustment or the neutral referee, as the case may be, shall be in writing, signed, acknowledged and certified in like manner as a deed to be recorded, and shall constitute an arbitration award which is final and binding on the parties. The decision shall order any or all of the parties to take such steps as may be necessary to give effect thereto, and the parties shall comply fully with the terms of such order, but until such order is issued the Company shall be entitled to take such action as it may deem to be within its rights.

(f) The expenses of the proceedings, including the compensation of the neutral referee, shall be shared equally by the Air Line Pilots Association International and the Company, and the proceedings shall be conducted pursuant to procedures established by the neutral referee.

(g) If the neutral referee is unable to serve, the dispute shall be submitted to final and binding arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association.

(h) The remedies prescribed in this Section 12 shall be exclusive and any claims not processed in accordance with the procedure herein provided shall be deemed to be waived.

13. This Memorandum of Agreement shall remain in effect so long as any Pilot whose name appears with an

asterisk on Appendix A hereof remains in the active employ of the Company as a flight crew member or retains recall rights. The parties hereto as well as the persons bound hereby irrevocably waive the right to serve any Section 6 notice under the Railway Labor Act of an intended change which, if adopted, would have the effect of modifying provisions contained in this Memorandum of Agreement, or otherwise to require bargaining as to such provisions, provided, however, that this Memorandum of Agreement may be changed by unanimous agreement among the Company, the Air Line Pilots Association International, and a majority of the Flight Officers' representatives on the American Airlines MEC.

14. The provisions of this Memorandum of Agreement shall prevail over inconsistent provisions in any agreement between the Company and the Air Line Pilots Association International. All agreements between the Company and the AAL Chapter, Flight Engineers International Association are hereby rescinded, and shall be of no further force and effect.

Crew Complement Agreement, Initialed by All Parties, December 1, 1962.

IN WITNESS WHEREOF, the parties have set forth their signature below this day of December, 1962:

FOR AMERICAN AIRLINES, INC.

.....

FOR THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL and the Air Line Pilots in the Service of AMERICAN AIRLINES, INC.

.....

FOR THE FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AAL CHAPTER, and Those Persons Whose Names Appear with an Asterisk on Appendix A hereof.

.....

December 3, 1962

[Appendix B will be comprised of a signed copy of the Memorandum of Agreement containing the following statement at the top of page 1:

This Agreement is with and for the benefit of and binding on *(Flight Officer's Name and Employee No.)*]

Portion of Affidavit of Counsel, March 13, 1963; Submitted in Connection with Motion for Reference to a Master.

(185) A dispositive issue involved in plaintiffs' motion for preliminary injunction, as well as the complaint herein, is whether a majority of defendant's flight deck employees desire the Joint Negotiating Committee to continue negotiating a settlement. Section 2 Fourth of the Railway Labor Act provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." (45 U. S. C. A. §152 Fourth.) This right of majority determination is ". . . .a part of the (186b) contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them" (45 U. S. C. A. §152 Eighth).

4. Because no other means of making the determination sought herein is available to defendant an exceptional condition exists which requires the appointment of a master. On March 11, 1963, I was advised by Mr. Leverett Edwards, Chairman of the National Mediation Board, that said Board will not entertain a carrier petition for such a determination. Moreover, no petition has been filed with the Board by any of the employee groups involved herein. No previous request for the relief sought herein has been made.

Decision of the Civil Aeronautics Board in *FEIA, EAL v. Eastern Air Lines, Inc.*, C. A. B. , E-19923, August 19, 1963.

(Opposite ☞)

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 19th day of August, 1963

Complaint of	:	
	:	
FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER	:	
	:	
vs.	:	Docket 14009
	:	
EASTERN AIR LINES, INC.	:	
	:	
Enforcement Proceeding	:	

ORDER DISMISSING COMPLAINT

This proceeding concerns a complaint of the Flight Engineers' International Association, EAL Chapter, AFL-CIO, (FEIA) that Eastern Air Lines, Inc., (Eastern) has violated section 401(k)(4) of the Federal Aviation Act of 1958, as amended, (the Act). That section of the Act provides that it shall be a condition upon the holding of a certificate of public convenience and necessity by any air carrier that it shall comply with title II of the Railway Labor Act.

The many documents filed and considered in this proceeding are listed in the appendix hereto. The matter is now before us for action on the motion of Eastern to dismiss the proceeding and various related pleadings. 1/

1/ The motion of Eastern to strike FEIA's answer filed February 20, 1963, is based on alleged late filing and upon failure to comport with the judicial standards of practice contemplated by the Board's Procedural Regulations. The timeliness argument is based on Eastern's contention that FEIA incorrectly assumed a postponement of the due date granted by the Chief Examiner's letter of February 11, 1963, at the request of the enforcement attorney to be applicable to their document also and that their filing based on that assumption was an unauthorized late filing.
(footnote continued)

In essence, the present controversy represents only a fragment of what has been a long and bitter jurisdictional dispute between Air Line Pilots Association (ALPA) and FEIA, which has involved all the major airlines, in reference to representation of flight engineers in jet aircraft. 2/ ALPA has taken the position that three pilots (albeit one of them qualified as a flight engineer) must be included in the flight deck crew of jet aircraft. FEIA, on the other hand, has contended that such crew must include a mechanic with an A. & E. or an A. & P. rating who should serve as the flight engineer. Prior to the present dispute, Eastern, in order to settle previous demands backed up by strikes or strike threats on the part of both ALPA and FEIA found itself obliged to agree to carry a flight deck crew of four on jet aircraft (including three pilots and one engineer with an A. & E. or an A. & P. license), in spite of the fact that FAA regulations required a crew of only two pilots and a flight engineer. The flight engineer requirement might be met either by a pilot qualifying as a flight engineer, or a mechanic with an A. & E. or A. & P. license who similarly qualifies. Eastern's agreement with FEIA was made in spite of the fact that Emergency Boards Nos. 120 and 121, which had been appointed pursuant to section 10 of the Railway Labor Act, had concluded that the third member of the crew should have basic qualifications as a pilot and that a mechanic's rating (the A. & E. or A. & P. license) was not required.

The letter did not restrict the postponement to the enforcement attorney's answer, and we do not agree with Eastern's position that FEIA's answer was filed late. However, we cannot countenance certain use of language in the answer. At page 29, FEIA states that "we shall not dignify this argument by any detailed contradiction of the many absolute falsehoods on which it is based." (Underscoring added). This is obviously an intemperate accusation in violation of Part 300.5 of the Rules of Conduct in Board Proceedings, which prohibits indulgence in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. Page 29 of FEIA's answer filed February 20, 1963, will therefore be stricken.

2/ For a more detailed description of the background of this controversy, see the opinion of Judge Feinberg in, Flight Engineers International Association, EAL Chapter v. Eastern Air Lines, 208 F.Supp. 182 (S.D.N.Y., 1962), and, Report to the President by the Commission to Inquire into a Controversy between Certain Air Lines and Certain of their Employees, May 24, 1961. (The Feinsinger Report).

The jurisdictional issue was injected into the instant labor negotiations of FEIA and Eastern as a result of the decision of the National Mediation Board in connection with United Air Lines, following a petition filed by ALPA, which determined that pilots and flight engineers constituted a single craft or class that should be represented by a single union. 3/ FEIA struck in protest, and in spite of an injunction obtained by Eastern, the union returned to work only after the appointment of the Feinsinger Commission by President Kennedy, which, after extensive hearings on the dispute, concluded that "neither peace nor safety on the airlines will be fully assured as long as there are two unions in the cockpit", 4/ and "that eventual representation of all flight deck crew personnel by a single union is inevitable. That end will come about in one of two ways--through a resumption of warfare between the two unions, or through a voluntary merger on fair and honorable terms." 5/ The present strike was commenced by FEIA on June 23, 1962 after compliance with the mediation procedures of the National Mediation Board, and after recommendations of Presidential Emergency Board No. 144 (the Kheel Board), which endorsed the recommendations of the Feinsinger Commission, had been rejected.

Prior to filing its complaint with the Board, FEIA brought two actions against Eastern and Eastern and ALPA respectively, in the United States District Court, Southern District of New York. 6/

3/ Application of Air Line Pilots Association, N.M.B. file No. C-2946, January 17, 1961.

4/ Feinsinger Commission Report, May 24, 1961, at 42.

5/ Feinsinger Commission Report, October 17, 1961, at 24.

6/ Flight Engineers International Association, EAL Chapter v. Eastern Air Lines, 208 F.Supp. 182 (S.D.N.Y., 1962) (Judge Feinberg's Opinion), affd. per curium, 307 F.2d 510 (C.A. 2, 1962), cert. denied, 372 U.S. 945 (1963); Flight Engineers International Association, EAL Chapter v. Eastern Air Lines and the Air Line Pilots Association, F.Supp. , 8 C.C.H. Aviation Cases 17,149 (S.D.N.Y., 1962) (Judge Levet's Opinion), affd. on other grounds, 311 F.2d 745 (C.A. 2, 1963), cert. denied, 373 U.S. 924 (1963).

Motions for preliminary injunctions were denied in both cases. The decisions were affirmed by the Court of Appeals, Second Circuit, and certiorari has been denied by the Supreme Court in both instances. Most of the issues presented in the complaint filed with the Board were before the courts in those proceedings. 7/

In its motion to dismiss, Eastern urges, inter alia, (1) that the Board should not relitigate matters that have been previously determined adversely to FEIA by the courts, (2) that because of FEIA's past conduct the Board should not grant relief on equity considerations, and (3) that dismissal would terminate a long drawn out labor dispute. Under section 1002(a) the Board may dismiss a complaint without a hearing whenever it is of the opinion that the complaint does not state facts which warrant investigation or action by the Board. 8/ The Board's rules pro-

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7/ The allegations in the Board complaint essentially raise 6 basic issues. Judge Feinberg's opinion determined two of these issues adversely to FEIA, i.e., (1) unilateral change in working conditions etc. without having first served a section 6 notice or exhausted the procedures of the Railway Labor Act, and (2) bargaining directly with individual flight engineers. The opinion determined certain aspects of a third issue (3) failure to bargain in good faith insofar as withdrawal of a previous offer is alleged. Judge Levet found as to the third issue that there was no failure to bargain in good faith by any insistence, by Eastern, on merger with ALPA as a condition to entering into an agreement, and he held that there was no merit to a fourth issue (4), entering into agreements with ALPA concerning engineers and an alleged unlawful conspiracy with ALPA to oust FEIA as bargaining agent. A fifth issue (5), failure to reinstate engineers when they had not been replaced in fact or in law (except to the extent the opinions held that securing replacements was lawful), was not before the courts. Nor was the sixth issue (6), failure to prosecute grievances as to alleged discharges before the system board of adjustment. Also certain aspects of the third issue (3), failure to bargain in good faith, insofar as it is alleged that Eastern had a fixed determination not to enter into any agreement, may not have been fully considered by the courts.

8/ It has been held that section 1002(a) vests in the Board "discretionary powers of investigation in respect to a filed complaint," Nebraska Department of Aeronautics v. Civil Aeronautics Board and Frontier Airlines, 298 F.2d 286 (C.A. 8, 1962). See also, Pan American-Grace Airways v. Civil Aeronautics Board, 178 F.2d 34 (C.A.D.C., 1949); Air Transport Association v. Civil Aeronautics Board (C.A.D.C., 10914) decided November 23, 1951 (not reported).

vide that a complaint shall be docketed for hearing, only if it shall appear that investigation is in the public interest. 9/ We find that in the circumstances surrounding the present labor controversy between FEIA and Eastern, investigation and action by the Board at this time would not be in the public interest, and is not warranted.

The decision of the Court of Appeals in the second case against Eastern and ALPA, on appeal from Judge Levet's decision, has particular significance in our consideration of whether a hearing on FEIA's complaint would be in the public interest. 10/ In that case, FEIA had sought an injunction requiring Eastern to bargain exclusively with FEIA with respect to terms of employment of flight engineers or so called "pilot engineers" (i.e., pilots hired to fill the position of flight engineers), and restraining Eastern and ALPA from bargaining as to those terms of employment and from giving effect to any agreements between them which concern those terms of employment. The court noted that the dispute represented one of rival claims as to the proper bargaining representative for the so called "pilot engineers", and held that the district court was without jurisdiction to grant the relief sought. Reliance was placed on the line of Supreme Court cases which hold that jurisdictional disputes as to the appropriate bargaining representatives have been left by Congress for exclusive determination by the National Mediation Board, or if the jurisdiction of the National Mediation Board was not invoked, such disputes should be settled by the normal processes of negotiation, mediation and conciliation. But in any event the decisions hold that it was the intention of Congress that the courts should not entertain questions of jurisdictional disputes. 11/

9/ Procedural Regulations Sec. 302.206 (14 C.F.R. 302.206).

10/ Flight Engineers International Association, EAL Chapter v. Eastern Air Lines and the Air Line Pilots Association, 311 F.2d 745 (C.A. 2, 1963), cert. denied, 373 U.S. 924 (1963).

11/ Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943); General Committee v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943); General Committee v. Southern Pacific Co., 320 U.S. 338 (1943). See also, Division 14, Order of R.R. Telegraphers v. Leighty, 298 F.2d 17 (C.A. 4, 1962); UNA Chapter, Flight Engineers Int'l. Assn. v. National Mediation Board, 294 F.2d 905 (C.A.D.C., 1961), cert. denied, 368 U.S. 956 (1962); Flight Engineers Int'l. Assn. v. Trans World Air Lines, Inc., 205 F.Supp. 137 (S.D.N.Y., 1962).

To a large extent we are faced with the same jurisdictional problem which confronted the Second Circuit, in that the history of the jurisdictional dispute between FEIA and ALPA over representation of Eastern's flight engineers or so called "pilot engineers" raises considerable doubt as to whether FEIA will continue as the certified bargaining agent for a single craft or class of flight engineers. Two Presidential emergency boards and the Feinsinger Commission have recommended that flight engineers should be qualified as pilots and that flight engineers and pilots should be represented by a single union. The decision of the National Mediation Board in the United case held that the pilots and flight engineers on that airline should constitute only a single craft or class. 12/ The Board finds, therefore, that it would be inappropriate to assume, in the light of this background, that FEIA will continue as the certified bargaining representative for Eastern's flight engineers and that there will be a continuing duty on the part of Eastern to bargain with FEIA as the appropriate bargaining agent for the engineers. If the Board were to hold a hearing on the complaint, a hearing that might last several years at great expense and inconvenience to all concerned, there is a substantial risk that prior to, or shortly after the completion of the hearings ALPA, rather than FEIA might be certified by the National Mediation Board as the bargaining agent for Eastern's pilots and pilot engineers or flight engineers. The Board cannot determine questions as to the appropriate bargaining representative or the appropriate craft or class for bargaining purposes, any more than can the courts. 13/ Under these circumstances, even if the Board were to find that

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12/ In a public statement dated February 21, 1961, the Chairman of the National Mediation Board advised that "the board's order in the United case is not necessarily binding on the rest of the airlines. Each case if sent to mediation will be judged on the basis of its facts . . ." However, the Board cannot ignore the substantial possibility of a similar determination being reached in the case of Eastern Air Lines were the Board to direct Eastern to bargain with FEIA by order entered in the present proceedings.

13/ See, Flight Engineers' International Association v. Western Air Lines, Inc., Docket 12223, Order No. E-17757, November 24, 1961, p.4, n.12; Air Line Pilots Association v. Southern Airways, Inc., Docket 11654, Order No. E-19162, January 3, 1963, p. 3.

Eastern had violated the Railway Labor Act, and accordingly was in violation of section 401(k)(4) of the Federal Aviation Act, the Board could not direct Eastern to commence good faith bargaining with FEIA, and any action on the Board's part would have to be confined to providing a remedy to individuals who have suffered as a result of past violations of the Act, as opposed to enforcement of a continuing duty of compliance.

Inasmuch as the Board could not take any effective action to require future bargaining by Eastern with FEIA, prior to a resolution of the jurisdictional controversy between ALPA and FEIA, to proceed with a hearing on the present complaint would not be in the public interest. 14/ The Board's function under 401(k)(4) of the Federal Aviation Act is to protect the public interest from continuing violations of the Railway Labor Act which might lead to disruption of air transportation arising from labor disputes. The public interest would not be served if the Board were to proceed with a hearing solely to provide a forum for the adjustment of private grievances, particularly where an adequate remedy is available in the courts, and where, as here, there has been resort to the courts to the extent previously indicated. 15/ We find, therefore, that the public interest would not be served by holding a hearing on FEIA's complaint prior to such time as the jurisdictional dispute between FEIA and ALPA is determined and it shall affirmatively appear that FEIA will continue as the certified bargaining representative for Eastern's flight engineers.

14/ We do not suggest that the Board will decline jurisdiction in every labor controversy where a claim is made that a certified union no longer represents the majority of the employees. Normally once a bargaining agent is certified by the National Mediation Board it is presumed certification continues until the National Mediation Board either de-certifies that union or certifies another union in its place. Oughton v. National Labor Relations Board, 118 F.2d 486, 498-99 (C.A. 3, 1941), cert. denied, 315 U.S. 797 (1942). However, the present jurisdictional dispute does not represent the normal situation, and the Board cannot ignore the determinations made in the instant labor controversy by the Presidential Boards and Commissions that have dealt with the question, nor the determination of the National Mediation Board in the United case.

15/ See, American Airlines v. North American Airlines, 351 U.S. 79 (1956).

There are additional reasons why proceeding with a Board hearing on FEIA's complaint would not be in the public interest. We refer to the various decisions by the courts which have determined most of the issues set forth in the complaint before the Board adversely to FEIA, and the continuing pendency of at least part of that litigation which will provide an adequate forum for determination of those issues in the complaint which have not previously been decided by the courts. It is recognized that prior court decisions, to which the Board was not a party, are not binding upon the Board in it's independent function to protect the public interest. 16/ Nevertheless, we conclude that under the facts and circumstances of this case the public interest would not be served by relitigation of those issues which have been determined by the courts, and by instituting proceedings which will parallel such continuing court litigation as may be

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16/ A.L.P.A. v. Southern Airways, Inc., Docket 11654, Order E-18560, July 5, 1962, p. 8 n.12; F.E.I.A. v. Western Air Lines, Inc., Docket 12223, Order E-17757, November 24, 1961, p. 3 n.7.

Under 401(k)(4) the Board has an interest separate and distinct from the parties to insure compliance with the Railway Labor Act as necessary for the interest of the public. National Licorice Co. v. NLRB, 309 U.S. 350 (1940). As such a determination in litigation between the complainant and the respondent in the courts, where the Board was not a party, cannot be and is not binding on the Board. See, Slocum v. Delaware L. & W. R. Co., 339 U.S. 239, 244 (1950); Curtis Publishing Co. v. F.T.C., 270 Fed. 881 (C.A. 3, 1921), affd. on other grounds, 260 U.S. 568 (1923); Westgate-Sun Harbor Co. v. Watson, 206 F.2d 458, 460 (C.A.D.C., 1953); New York State Labor Relations Board v. Holland Laundry, 294 N.Y. 480, 63 N.E.2d 68 (C.A.N.Y., 1945), reh. denied, 295 N.Y. 568, 64 N.E.2d 278. The N.L.R.B. and the I.C.C. have similarly held that they are not bound by prior court decisions in Matter of South Atlantic Steamship Co., 12 N.L.R.B. 1367 (1939); Matter of M. & M. Woodworking Co., 6 N.L.R.B. 372 (1938); Matter of Williams Mfg. Co., 6 N.L.R.B. 135 (1938); Chicago S.S. and S.B.R.R., 234 I.C.C. 34 (1939); Division 215 of Amalgamated Assn. v. Chicago A. & E. R.R., 234 I.C.C. 301 (1939). The Supreme Court has held that where the courts and a Federal Administrative Agency have concurrent jurisdiction to enforce a Federal statute there is no reason why proceedings in the two forums should not proceed simultaneously. Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948), reh. denied, 334 U.S. 839 (1948).

pursued by FEIA. Those issues which have not been previously litigated in the courts, may be included in the court proceedings by amendment of the complaint upon a hearing for a permanent injunction. 17/

As noted, most of the issues of the Board complaint have been determined adversely to FEIA in the two court proceedings. Appeal has been taken and certiorari has been denied by the Supreme Court. Although the court determinations were made without a hearing, the material facts are for the most part documented or are not disputed. Many of the issues concern solely questions of law and the determination of the legal questions having been reviewed by the Court of Appeals, and left undisturbed by the Supreme Court, such determinations would be entitled to great weight in any Board consideration of the controversy. There appears to be no reason why the courts cannot provide adequate and complete relief to the complainant, and it does not appear that Board proceedings would be concluded with any greater dispatch than the continuing litigation in the courts. In light of the extensive nature of court litigation which has at this time finally determined so great a portion of the allegations set forth in the complaint, we conclude that investigation or action on the Board's part would be warranted only upon a showing of a peculiar requirement of the public interest for Board proceedings in this matter. The complaint and other documents filed with the Board fail to set forth any facts which would indicate that there is such a public interest requirement. We conclude, therefore, that considering the sum total of the nature and effect of the past and pending court litigation that a hearing on the complaint would not be in the public interest or in furtherance of the purposes of the Federal Aviation Act. 18/

17/ We do not suggest that an application to the courts for a temporary injunction will, standing alone, constitute an election of remedies which will bar subsequent proceedings before the Board under section 401(k)(4). We note that the injunctive remedy of the court provides a form of relief which it is beyond the power of the Board to grant.

18/ The situation here is radically different from that which existed in ALPA v. Southern Airways, Inc., supra, where we reached conclusions in our order that differed in some respects from a prior decision of a Federal District Court. There the complaint was filed with the Board, the petition for enforcement had been docketed, and the hearing notice issued before the court proceeding was instituted. The interim court decision was not

(footnote continued)

In view of all the foregoing, we find that the complaint does not state facts which warrant investigation or action by the Board at this time, and that a hearing on the complaint would not now be in the public interest. We further find that no useful purpose would be served by deferring action pending resolution of the jurisdictional dispute and final conclusion of the pending court litigation, and therefore we dismiss the complaint. 19/ However, our dismissal shall be without prejudice to renewal of the complaint if, in accordance with this opinion, circumstances should so warrant.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion filed March 1, 1963, by FEIA for leave to file a responsive pleading be and it is granted.

2. The motion to strike filed February 27, 1963, by Eastern be and it is granted insofar as it requests striking of page 29 of FEIA's answer filed February 20, 1963, and is otherwise denied.

3. The complaint filed by FEIA on September 10, 1962, be, and it is dismissed.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

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issued until after the Board hearing had been completed and the Examiner's Initial Decision had been served. Furthermore the Court decision was not final at the time of the Board's decision, inasmuch as the decision was subject to reversal on appeal.

19/ The Bureau of Enforcement has submitted the opinion of its Director that the allegations of the complaint contain reasonable grounds to believe that the provisions of 401(k)(4) of the Act have been and are being violated and that formal investigation is in the public interest. Significantly, however, the Bureau did not specify the grounds for its conclusions. In answer to Eastern's motion to dismiss, the Bureau recommends denial of the motion, but further recommends that the Board postpone further procedural steps in this matter, pending the conclusion of the litigation now before the courts.

Appendix

DOCUMENTS FILED

Party	Nature of Document	Date Filed
Flight Engineers	Complaint	Sept. 10, 1962
Eastern	Answer	Sept. 25, 1962
Flight Engineers	Reply to answer	Oct. 26, 1962
Eastern	Response to reply	Nov. 5, 1962
Bureau of Enforcement	Petition for enforcement	Jan. 22, 1963
Eastern	Motion to dismiss	Feb. 1, 1963
Flight Engineers	Answer to motion to dismiss	Feb. 20, 1963
Enforcement Attorney	Answer to motion to dismiss	Feb. 25, 1963
Eastern	Motion to strike answer of Flight Engineers filed Feb. 20, 1963	Feb. 27, 1963
Flight Engineers	(1) Motion for leave to file responsive pleading; (2) Responsive pleading to Enforcement Attorney's answer to motion to dismiss	March 1, 1963
Flight Engineers	Answer to Eastern's motion to strike filed Feb. 27, 1963	March 5, 1963
Enforcement Attorney	Answer to Eastern's motion to strike filed Feb. 27, 1963	March 6, 1963
Eastern	Answer to motion of Flight Engineers filed March 1, 1963	March 11, 1963